90-482 (1)

No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SPANG & COMPANY,
Petitioner,
v.
MATTHEW A. DELGROSSO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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159

QUESTIONS PRESENTED

1. Whether, in the guise of exercising its mandamus power, a court of appeals may summarily decide genuine issues of material fact on which the district court has never taken evidence or made findings and which are awaiting trial in a companion case.

2. Whether, under the Employee Retirement Income Security Act of 1974 and regulations of the Pension Benefit Guaranty Corporation and Internal Revenue Service thereunder, there are two or more pension plans when any part of the pension assets is earmarked or set aside so that it is not available to pay benefits to all participants in the plan.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were: Spang & Company;[1] the original plaintiffs in the district court, Matthew A. DelGrosso, James P. Blair, Lester Ware, Jimmie Mines, Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Sr., Gilbert Weese, Larry K. Hill, Charles G. Church, Jr., John R. Alves, Barry K. Racz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, Hubert J. Lee and Charles E. Van Riper (collectively, the "Lorain non-vested participants"); and unnamed "vested participants," who were impleaded into this case by the court of appeals, sua sponte, in the first appeal to that court. We will refer to all of the foregoing as the "respondents." We will refer to the original 19 plaintiffs as "plaintiffs."

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[1] Spang & Company is a privately-held Pennsylvania corporation. It has no parent company, affiliate or subsidiary, except a wholly-owned subsidiary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. _____

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Spang & Company respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit in this case entered on May 17, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals ("*Spang II*") is reported at 903 F.2d 234. (App. at 1a-19a). An earlier opinion of the United States Court of Appeals in the same case ("*Spang I*") is reported at 769 F.2d 928. (App. at 6b-32b). The opinions of the district court granting summary judgment in favor of petitioner are unreported. (App. at 33b-49b; 52b-59b). The opinion of the district court denying petitioner's motion to dismiss is reported at 586 F. Supp. 177.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit directing the clerk of that court to issue a writ of mandamus to the district court was entered on May 17, 1990. (App. at 20a). Petitioner's timely petition for rehearing was denied on June 18, 1990. (App. at 1c-3c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Pension Benefit Guaranty Corporation Regulation 29 C.F.R. § 2615.2 provides, in pertinent part:

> For purposes of this part (unless otherwise indicated or required by the context)—
>
> * * *
>
> "Plan" means a single plan (whether it be a single employer, multiemployer or multiple employer plan), as opposed to a number of plans, if, on an ongoing basis, all of the plan assets are available to pay benefits

to employees who are covered by the plan and their beneficiaries.

29 C.F.R. § 2615.2.

Internal Revenue Service Regulation 26 C.F.R. § 1.414(l)-1(b)(1) provides, in pertinent part:

> (1) *Single plan.* A plan is a "single plan" if and only if, on an ongoing basis, all the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:
>
> > (i) The plan has several distinct benefit structures which apply either to the same or different participants,
> >
> > (ii) The plan has several plan documents,
> >
> > (iii) Several employers, whether or not affiliated, contribute to the plan,
> >
> > (iv) The assets of the plan are invested in several trusts or annuity contracts, or
> >
> > (v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.
>
> However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

26 C.F.R. § 1.414(l)-1(b)(1).

STATEMENT

1. Petitioner, Spang & Company, used to maintain a Ferroslag Division, which processed slag under contract with U.S. Steel Corporation at plants located next to U.S. Steel facilities. (App. at 9e). Prior to 1967, petitioner had slag processing plants in Chicago, Illinois, and Lorain, Ohio. (App. at 11d-12d). Production and maintenance employees at both plants were represented for the purpose of collective bargaining by the United Steelworkers of America, ALF-CIO-CLC (the "Union") and were covered by the same basic labor agreement, insurance agreement and pension agreement between petitioner and the Union. (App. at 12d, 9e).

The pension agreement required petitioner to contribute to the pension fund a certain number of cents for each hour worked by the covered employees and provided that the contributions could not revert to petitioner. (App. at 14d). The pension assets were held in a single trust fund, with a bank as trustee, and were all available to pay benefits to any employee who might become entitled to a pension under the terms of the pension agreement. (App. at 16e).

In 1967, petitioner received a five-year contract to process slag at the Homestead, Pennsylvania, facility of U.S. Steel and opened a third plant there. (App. at 12d). The same set of collective bargaining agreements with the Union that covered the Chicago and Lorain plants then also covered petitioner's Homestead plant. (App. at 9e). Because the future of the Homestead plant was not assured, however, the Union proposed in 1969 that, in the event a plant closed, the employees at the closed plant would be limited to enjoying only that portion of the pension assets which was allocable to that plant (the allocation to be made on the basis of contributions made for employees at each plant). Specifically, the Union proposed as follows:

> [W]e want to set the fund up so that the contributions attributable to each plant shall be earmarked so that in the event of a plant termination the earmarked portion of the fund will be used to provide pension benefits to the shutdown plant.

(App. at 1d). Petitioner accepted the Union's proposal as follows:

> Concerning the second part of the letter dealing with records and administration, it is our proposal to keep the contributions applicable to each of the Plans separate and distinct so as to enable us to equitably segregate the large fund into its component parts . . . . Inasmuch as this is, in reality, one Trust providing for uniform benefits, the segregation will only be applicable in the event of one location's termination, at which time the fund can be divided from the records presently maintained.

(App. at 3d). Accordingly, petitioner and the Union added to the pension agreement in 1970 a new section 10.3 which provided, in pertinent part, as follows:

> In the event a plant is permanently shut down . . . the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all employees at such location compared to the total contributions made on behalf of all locations.

(App. at 17d). That provision was later re-numbered as section 11.3, and thereafter as section 13.3, but remained unchanged in substance. (App. at 18d, 19d, 20d, 10e). To facilitate the allocation requirement of the pension agreement, petitioner thereafter maintained separate accounting for the pension assets allocable to each plant and regularly informed the Union of these amounts, without objection. (App. at 16e, 17e).

The Homestead plant was in fact closed in 1973, after the contract with U.S. Steel expired. (App. at 13d, 10e-

11e). Petitioner bargained with the Union over the effects of the closing, as required by law, including the disposition of the pension assets allocable to that plant, and entered into a written collective bargaining agreement under which the pension assets allocable to the Homestead plant were distributed in cash to the employees of that plant. (App. at 10e-11e).

The slag-processing plant at the U.S. Steel South Works in Chicago was closed in 1979. (App. at 13d, 11e). Petitioner again bargained with the Union over the effects of the closing, including the disposition of the pension assets allocable to the Chicago plant, and entered into a written collective bargaining agreement under which (i) the Chicago employees were provided with their defined benefit pensions through the purchase of a group annuity contract from an insurer, (ii) all claims to the balance of the pension assets allocable to the Chicago plant were released, and (iii) the pension agreement, which otherwise forbade reversion of pension contributions to petitioner, was terminated as to the Chicago pension assets. (App. at 13d-14d, 21d-23d, 11e-12e). Petitioner thereupon promptly notified the Union of its intention to terminate the plan as to Chicago and recover the Chicago surplus, and the Union did not object. (App. at 13e). For business reasons, however, petitioner later decided not to terminate the plan as to Chicago at that time and left the Chicago surplus in the pension trust fund. (App. at 13e).

After the Chicago plant was closed in 1979, the only remaining plant covered by the pension agreement was the Lorain plant. In 1980, petitioner and the Union entered into new collective bargaining agreements covering only the Lorain plant, including a pension agreement. (App. at 14e). The Lorain plant was closed in 1982. (App. at 14d). At that point, the pension trust contained (i) the assets allocable to the Lorain plant (which were sufficient to pay the Lorain employees their defined benefit pensions, plus

a surplus allocable to the Lorain plant) and (ii) the Chicago surplus. (App. at 15d). Petitioner chose not to terminate the pension plan but instead to continue it and pay the former Lorain employees their defined benefit pensions as and when due. (App. at 15d).

2. In December 1982, 19 former Lorain employees (plaintiffs) sued petitioner in the United States District Court for the Western District of Pennsylvania under section 502 of ERISA, 29 U.S.C. §1132, and section 301 of the Labor Management Relations Act, 29 U.S.C. §185, claiming that the 1980 pension agreement (applicable only to Lorain) prohibited the reversion of any surplus to petitioner—either the Lorain surplus or the Chicago surplus. Plaintiffs moved for summary judgment on three of the four counts in their complaint, and there was extensive consideration of whether the case could be decided on cross motions for summary judgment.

For example, at the final pretrial conference petitioner advised the district court that, while there were no facts in dispute as to liability, there were disputed facts as to damages. (App. at 4d-5d).[2] At the district court's request, the parties met to attempt to stipulate to the facts regarding damages, but were unable to reach agreement. Thereafter, petitioner filed a cross-motion for summary judgment as to liability (*i.e.*, whether the 1980 pension agreement prohibited reversion at all), but explicitly noted that issues of fact remained as to damages (*i.e.*, exactly what portion of the pension assets would be subject to the prohibition on reversion, if there were such a prohibition).[3]

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[2] Counsel for petitioner: "I anticipate that we may have problems on stipulating what is the appropriate damage figure . . . . I think it's a very intricate factual situation where the viewpoint on damages may vary." (App. at 5d).

[3] "Notwithstanding the inability of the parties to agree upon a set of stipulated facts, [petitioner] believes that the Court will find

In opposing plaintiffs' motion for summary judgment as to damages, petitioner established the factual dispute over the separate nature of the Chicago surplus by affidavit and on brief. Petitioner filed the affidavit of William T. Marsh, Vice President, Secretary and General Counsel of petitioner, establishing that the Chicago and Lorain pension fund assets were accounted for separately.[4] On brief, petitioner explained:

> Much of the pension trust consists of funds and investment growth attributable to the Chicago facility which was closed in 1979. (Marsh Affidavit, ¶11). Under no conception of the case are Plaintiffs, former Lorain, Ohio employees, entitled to assets attributable to work performed by former Chicago employees.

(App. at 8d). Petitioner further stated its position on damages as follows: "[Petitioner] . . . contends, *inter alia,*

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all of the material facts for purposes of [petitioner's] cross-motion for summary judgment to be undisputed . . . . [Petitioner] of course believes that the amount of damages is an issue which will not need to be addressed by the Court. Its positions on damages, however, are included in [petitioner's summary judgment brief in support of its motion and in opposition to plaintiffs' motion]." (App. at 7d).

[4] The Affidavit of William T. Marsh provides, in pertinent part:

> As of August 1, 1982, the balance in the pension trust was approximately $1,253,511. The contributions by [petitioner] to the pension trust attributable to Chicago and Lorain, from the inception of the pension trust to the present, are as follows:

Chicago	$192,225.32
Lorain	189,114.09
Total	$381,339.41

> As of August 1, 1982, the balance in the pension trust attributable to each location was approximately as follows:

Chicago	$ 532,002.00
Lorain	721,509.00
Total	$1,253,511.00

(App. at 15d).

that Plaintiffs . . . , at most, are entitled only to any remaining assets which might exist that are attributable to the Lorain, Ohio facility." (App. at 9d). So that there could be no misunderstanding about the need for a trial on damages, petitioner summarized:

> Even if Plaintiffs are somehow deemed entitled by the Court to more than their accrued pension benefit, they are not entitled to all remaining funds in the pension trust.
>
> As previously noted, a substantial portion of the current pension trust fund balance is attributable to the carryover of surplus from the Chicago closing. (Marsh Affidavit, ¶11) . . . . Therefore, under a proper application of Section 13 of the pension agreement to Plaintiffs' theory of liability, Plaintiffs would be entitled at most to annuities purchased with approximately one-half of the pension trust assets [*i.e.*, the Lorain assets only].

(App. at 9d).

The district court granted summary judgment to petitioner, holding that the 1980 pension agreement did not prohibit the reversion of any surplus to petitioner. (App. at 50b-51b).[5] Because the district court found that there was no prohibition on reversion, it never considered or decided the primary factual question on damages: whether, based on the collectively bargained pension agreements and other documents such as the Chicago closing agreement, the parties' intent in negotiating and drafting those documents, and the parties' course of performance under those documents, a prohibition on reversion would apply to the Chicago surplus as well as to the Lorain surplus.

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[5] The parties then filed cross-motions for summary judgment on the remaining count and the district court granted petitioner's motion, denying plaintiffs'. (App. at 60b).

3. The United States Court of Appeals for the Third Circuit concluded that the district court erred in its reading of the 1980 pension agreement (which applied only to the Lorain plant) and reversed the summary judgment in favor of petitioner. (App. at 27b-28b). But instead of remanding for consideration of petitioner's other defenses, which had never been ruled upon, the court of appeals directed the district court to enter summary judgment in favor of plaintiffs as to liability, declaring that, under the 1980 pension agreement none of the "Fund" could revert to petitioner. (App. at 27b-28b). The court of appeals also directed the district court to appoint an independent plan administrator to determine whether the plan should be terminated and, if so, to distribute the assets. (App. at 26b-28b). This Court denied certiorari.[6] 476 U.S. 1140 (1986).

4. On remand, the district court entered summary judgment in favor of plaintiffs as to liability, as required by the court of appeals, and attempted to appoint an independent plan administrator to resolve the question of damages, *i.e.*, whether the prohibition on reversion in the 1980 pension agreement applied to the Lorain surplus only or to the Chicago surplus as well. (App. at 8a, 9a-10a, 24d). The district court could not find an individual who was willing to serve as independent plan administrator, because none of the candidates could obtain fiduciary liability insurance in view of the likelihood of litigation over the administrator's determination of the damages question. (App. at 10a).

5. Respondents took two parallel courses of action. First, they commenced a companion case in the same district court (which has been assigned to the same district judge) seeking, *inter alia*, a declaratory judgment that the

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[6] The decision of the court below on the first appeal has been soundly criticized by expert commentators. E.T. Veal and E.R. Mackiewicz, *Pension Plan Terminations* 238-41 (John Wiley & Sons 1989).

former Lorain employees were entitled to all of the surplus (Chicago as well as Lorain). *DiFrancesco, et al. v. Spang & Company*, Civ. No. 89-1680 (W.D. Pa.) (App. at 1e-4e). After extensive discovery, this companion case is presently on the trial list for trial of the factual question whether the plan assets that cannot revert to petitioner under the 1980 pension agreement include both the Chicago surplus and the Lorain surplus, or the Lorain surplus only. Among the subsidiary factual issues that have been demonstrated on brief and properly supported by affidavits and exhibits under Rule 56, and therefore must be tried, are the following:

(a) whether section 10.3 of the 1970 pension agreement was intended to, and did, create separate pension funds for the Homestead, Chicago and Lorain plants;[7]

(b) whether, in their subsequent course of performance, petitioner and the Union consistently treated the pension assets as separate funds for each plant, through regular separate accounting;[8]

(c) whether and how section 11.3 (renumbered from section 10.3) was applied when the Homestead plant closed;[9]

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[7] Both parties in *DiFrancesco* have listed as a witness the official of petitioner who negotiated that agreement with the Union. (App. at 5e-6e). That witness's testimony will show that, contrary to the plaintiffs' contentions, the parties intended to create separate pension funds in the event of plant closing.

[8] Plaintiffs in *DiFrancesco* contend that the facts establish a unitary fund. *See, e.g.*, (App. at 5e).

[9] Although the plaintiffs in *DiFrancesco* have neither admitted nor denied this matter, the district court must resolve the factual issue whether section 11.3 was applied mandatorily to separate out the Homestead pension assets for disposition in collective bargaining upon that plant's closing, because this fact supports petitioner's factual claim that the Chicago pension assets were similarly sepa-

(d) whether and how section 13.3 (re-numbered from section 11.3) was applied when the Chicago plant closed;[10]

(e) whether the closing agreement between petitioner and the Union regarding pensions for the Chicago employees was intended to, and did, release the Chicago pension fund surplus to petitioner;[11]

(f) whether, in the course of performance of the Chicago closing agreement, petitioner announced and set about to recover the Chicago surplus in 1980, without objection from the Union;[12] and

(g) whether petitioner and the Union, in their 1980 negotiations relating to the Lorain plant, manifested a common understanding that the 1980 pension agreement applied only to the separate Lorain pension fund, not to the Chicago surplus as well.[13]

6. Second, respondents petitioned the court below for a writ of mandamus, arguing that the court below had

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rated out for disposition in collective bargaining when the Chicago plant closed.

[10] Contrary to petitioner's contention, plaintiffs in *DiFrancesco* claim that section 13.3 was not applied at all in the Chicago plant closing. (App. at 7e).

[11] Contrary to petitioner's claim, plaintiffs in *DiFrancesco* contend that the Chicago closing agreement granted no surplus to petitioner. (App. at 8e).

[12] The plaintiffs in *DiFrancesco* contend that petitioner never told the Union that petitioner intended to make an ERISA termination of the Chicago pension fund through the Pension Benefit Guaranty Corporation (a step that would have allowed Spang to recover the Chicago fund surplus). *See* (App. at 7e).

[13] The plaintiffs in *DiFrancesco* contend that, during the negotiation of the 1980 pension agreement for the Lorain plant, petitioner acknowledged that the subject of the negotiations was a single pension fund, and that neither petitioner nor the Union recognized the separate existence of the Chicago fund surplus. (App. at 8e).

already decided the damages question (on the first appeal) and requesting an order directing the district court to reappoint the independent plan administrator to distribute all of the surplus (Chicago as well as Lorain) to the proper participants.[14] (App. at 3a). The court below granted respondents' petition for a writ of mandamus, holding (for the first time) that its decision on the earlier appeal had disposed of not only the Lorain surplus but also the Chicago surplus. (App. at 14a-16a, 19a). This was in spite of the fact the district court never considered, and petitioner never was afforded an opportunity to prove, petitioner's contention that the Chicago pension fund had been separate from the Lorain and Homestead funds since 1970 and that the collective bargaining agreement between petitioner and the Union after the closing of the Chicago plant released the Chicago fund surplus to petitioner. Ignoring the fact that this question presented genuine issues of material fact, and had undergone extensive discovery and was being prepared for trial in the companion *DiFrancesco* case, the court below exercised its mandamus power to, *inter alia*, order the district court to carry out the directives of *Spang I* with respect to all of the surplus (Lorain and Chicago), and to determine the identity of the proper participants in the plan. (App. at 18a-19a). Petitioner petitioned for panel re-hearing with a suggestion for re-hearing in banc, which petition was denied on June 18, 1990. (App. at 1c-3c).

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the proper scope of summary appellate adjudication via the mandamus power when there are genuine issues of material fact never considered by or litigated before the

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[14] Respondents also attempted to appeal to the court below pursuant to 28 U.S.C. §1291. That appeal was dismissed by the court below. (App. at 4b-5b).

district court. This case also presents an important question under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA") with respect to whether one plan or more than one plan exists if some plan assets are restricted so that they are not available to pay benefits to all plan participants.

I. BY SUMMARILY DECIDING GENUINE ISSUES OF MATERIAL FACT THE COURT BELOW EGREGIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The court below effectively (but improperly) resolved against petitioner numerous genuine issues of material fact on which the district court never took evidence and on which the district court never made findings. The decision below therefore conflicts with the uniform decisions of this Court and other courts of appeals holding that (a) summary judgment may not be granted in the face of genuine issues of material fact and (b) genuine issues of material fact can be resolved only after full opportunity for presentation of evidence to, and consideration by, the finder of fact.

The damages issue in this case is fact-intensive and requires determinations on the meaning and effect of various written agreements, the intent of the parties in drafting them, and the parties' course of conduct under those agreements. By deciding the damages issue without the benefit of these factual determinations, the decision below conflicts with decisions of this Court and other courts of appeals holding that summary judgment simply cannot be granted in the face of genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Fountain v. Filson*, 336 U.S. 681, 683 (1949) (per curiam) ("Summary judgment may be given, under Rule

56, only if there is no dispute as to any material fact."); *Associated Elec. Coop., Inc. v. Morton*, 507 F.2d 1167, 1178 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 894-95 (1st Cir. 1988); *United States v. J.B. Williams Co.*, 498 F.2d 414, 430 n.19 (2d Cir. 1974); *Pulliam Investment Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987); *Watkins v. Northwestern Ohio Tractor Pullers Ass'n*, 630 F.2d 1155, 1158 (6th Cir. 1980); *Choudhry v. Jenkins*, 559 F.2d 1085, 1088-89 (7th Cir.), *cert. denied*, 434 U.S. 997 (1977); *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987); *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977); *Conaway v. Smith*, 853 F.2d 789, 792 n.4 (10th Cir. 1988); and *Pinnacle Port Community Ass'n, Inc. v. Orenstein*, 872 F.2d 1536, 1538 (11th Cir. 1989). Professors Wright and Miller have aptly encapsulated settled law on the constraints on a court of appeals' review when issues of fact exist: "[The court of appeals] must reverse the grant of a summary judgment motion if it appears from the record that there is an unresolved issue of material fact; it cannot simply substitute a judgment for the appellant." 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2716 at 654-56 (1983) (footnote omitted).

The reason that summary judgment cannot be granted when there are genuine issues of material fact is that it would deprive unsuccessful litigants of their right to a full evidentiary hearing on those issues before the finder of fact. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467 (1962); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); *Washington v. Cameron*, 411 F.2d 705, 709 (D.C. Cir. 1969); *Walgren v. Howes*, 482 F.2d 95, 98 (1st Cir. 1973); *United States v. J.B. Williams, Co.*, 498 F.2d 414, 430 n.19 (2d Cir. 1974); *Kirkpatrick v. Consolidated Underwriters*, 227 F.2d 228, 231 (4th Cir. 1955); *United States v. Burket*, 402 F.2d 426, 430 (5th Cir. 1968); *Tee-Pack, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193, 1196 (6th Cir. 1974);

Devex Corp. v. Houdaille Indus., Inc., 382 F.2d 17, 21 (7th Cir. 1967); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987); *Lane Bryant, Inc. v. Maternity Lane, Limited*, 173 F.2d 559, 565 (9th Cir. 1949); *Harman v. Diversified Medical Investments Corp.*, 488 F.2d 111, 113 (10th Cir. 1973); *Tippens v. Celotex Corp.*, 805 F.2d 949, 952-53 (11th Cir. 1986). The United States Court of Appeals for the Second Circuit has clearly articulated the rights that cannot be infringed by a judgment pursuant to Rule 56:

> There is no question that under F.R.Civ.P. 56, whether in a jury trial or a trial to the court, the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion.

United States v. J.B. Williams, Co., 498 F.2d 414, 430 n.19 (2d Cir. 1974) (collecting cases).

The fact issues as to damages in this case are neither hidden nor subtle; they have been clearly exposed, heavily discovered, and are currently awaiting trial before the same district judge in *DiFrancesco*. It is a mark of how far the court below departed from the accepted and usual course of judicial proceedings that its opinion does not reveal that it even considered whether issues of fact stood in the way of summary judgment as to damages in favor of respondents. It never stated that there were *no* genuine issues of material fact. Indeed, the decision below is based primarily on a record from a *previous* appeal of a grant of summary judgment and therefore is twice removed from the district court proceedings.

It may be that the court below was motivated by a desire to put an end to this litigation and used the summary judgment device to effect this result. This Court made clear in *Sartor*, however, that a court of appeals' desire to terminate lengthy litigation does not trump a party's right to an evidentiary hearing on genuine issues of material fact. This Court stated: "In the very proper endeavor to terminate a litigation before it for the fourth time, we think [the court of appeals] overlooked considerations which make the summary judgment an inappropriate means to that very desirable end." *Sartor*, 321 U.S. at 627. So it is with the decision below.

The decision below also conflicts with the closely related line of cases holding that courts of appeals may not grant judgment on appeal based on an issue never considered or decided by the district court. By deciding the damages issue even though the district court never reached it, the decision below conflicts with this Court's decisions in *Fountain v. Filson*, 336 U.S. 681 (1949) (per curiam) and *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). *See also Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Mariash v. Morrill*, 496 F.2d 1138, 1144 (2d Cir. 1974); *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 108-09 (5th Cir. 1976); *Hartford Accident & Indemnity v. Gulf Insurance Co.*, 837 F.2d 767, 773 (7th Cir. 1988); *Callaghan v. Woods*, 736 F.2d 1269, 1275 (9th Cir. 1984). *Cf. also Singleton v. Wulff*, 428 U.S. 106, 119-21 (1976) (where case had been disposed of in district court on motions to dismiss, court of appeals' decision to reach merits of case was an "unacceptable exercise of its appellate jurisdiction."); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948) (court of appeals improperly granted j.n.o.v. to party who had lost in trial court and had not moved for such relief there); *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947) (same).

In this Court's foundational case of *Fountain v. Filson*, plaintiffs claimed an interest in property owned by the

defendant, on a theory of resulting trust in realty. Defendant moved for, and won, summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the issue of resulting trust. The court of appeals concluded that the summary judgment for defendant was correct on the issue of resulting trust. But the court of appeals went on to examine the pre-trial discovery, concluded that plaintiffs had a meritorious claim of personal obligation, and remanded to the district court with instructions to enter judgment in favor of plaintiffs. The court of appeals denied defendant's motion for modification of the order to permit a trial on the issue of personal obligation.

This Court granted defendant's petition for certiorari and reversed the judgment of the court of appeals. This Court held that the court of appeals erred because "[t]here was no occasion in the trial court for [defendant] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on [defendant's] motion for summary judgment was the claim that there was a resulting trust." 336 U.S. at 683.[15] This Court further held: "When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive [defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her." *Id.*[16] The decision below plainly conflicts with this Court's decision in *Fountain*, as well as with its progeny.

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[15] Unlike *Fountain*, there were cross-motions for summary judgment in this case. Because those motions and district court proceedings related to them starkly portrayed the genuine issues of material fact as to damages (*see supra*, Statement at ¶ 2), the decision of those issues by the court below was even more surprising and less fair than it would have been if cross-motions had not been filed.

[16] This Court also explained the necessity for allowing a litigant an opportunity to litigate factual issues in the district court, rather

If this case had proceeded in accordance with the uniform case law of this Court and the other courts of appeals, the court below would have ordered the district court to decide the issue of damages in the first instance after taking evidence on the genuine issues of fact.[17] Indeed, this would have been the course of events if the district court originally had denied petitioner's motion for summary judgment and had granted summary judgment to respondents as to liability: a trial on damages would have followed.[18] By deciding genuine issues of material fact for

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than in the court of appeals, in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941):

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

This Court has also explained that litigation of facts in the district courts is essential to effective appellate review. *Arenas v. United States*, 322 U.S. 419, 431 (1944) ("The outlines of the controversy are clear, but the summary disposition of the case has precluded the adversary trial which alone would give reliable foundation for determining it.").

[17] *Spang II* held that, "[u]nder the circumstances, the district court clearly had the authority to decide whether the Chicago assets are part of the Fund. . . ." (App. at 14a). The court of appeals should have stopped there.

[18] Indeed, Rule 56 specifically contemplates that "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Fed. R. Civ. P. 56(c). Thereafter, the damages issue should be tried. 6 Pt.2 J. Moore & J. Wicker, *Moore's Federal Practice* ¶56.19 at 56-676 (2d ed. 1988) ("Subdivision (d) [of Rule 56] clearly imports that a trial as to the amount of damages shall be conducted.") (footnote omitted) (collecting cases).

the first time on appeal, the decision of the court below is in conflict with *Poller, Sartor, Fountain, Hormel* and their progeny. Review by this Court is necessary to harmonize the decision of the court below and to correct its egregious departure from the accepted and usual course of judicial proceedings.[19]

The decision of the court below so far departs from the accepted and usual course of judicial proceedings that it not only violates Rule 56 and the decisions of this Court and other courts under that rule, but rises to the level of a violation of due process under the fifth amendment to the United States Constitution. As established by *Poller, Sartor, Fountain, Hormel*, and their progeny, a litigant has a right to present evidence on genuine issues of material fact and to have the finder of fact consider that evidence.[20] A

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[19] The court below also placed itself in conflict with decisions of this Court and the other courts of appeals by usurping the fact-finding function of the district court. *See, e.g., Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948) ("The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.").

The decision below also conflicts with the principles underlying this Court's decisions in the related context of an appellate court's scope of review of district court findings of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982) (trial court judge has "unique opportunity . . . to evaluate the credibility of witnesses and to weigh the evidence"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

[20] *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944); *Fountain v. Filson*, 336 U.S. 681 (1949); *Hormel v. Helvering*, 312 U.S. 552 (1941).

decision depriving a litigant of this right is a violation of the litigant's right to due process under the fifth amendment.[21] U.S. Const. amend. V. Accordingly, review by this Court of the decision below is necessary to correct this violation of petitioner's due process rights.[22]

II. THE DECISION BELOW CONFLICTS WITH REGULATIONS OF THE UNITED STATES REGARDING SINGLE VERSUS MULTIPLE PENSION PLANS.

In its headlong rush to decide the damages question without evidence, argument or decision in the district court, the court below disregarded controlling law under ERISA regarding multiple plans and placed itself in conflict with the federal agencies responsible for administering this portion of ERISA—the Pension Benefit Guaranty

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[21] Rule 56 is also violated in such instances. Because the entry of summary judgment in violation of Rule 56 constitutes a violation of due process under the fifth amendment, however, the violations are not distinguishable.

[22] The first notice petitioner had that genuine issues of material fact were being decided against it in violation of its due process rights was when *Spang II* was announced. Subsequent to *Spang I*, petitioner thought that the issue of damages had been resolved in petitioner's favor. Petitioner so argued to the district court and the court below. *See, e.g.*, (App. at 25d) ("Your Honor, the Third Circuit opinion says the fund was divided into two. This is a suit by only Lorain participants. I think fairly read, the opinion is clearly directed toward the disbursement of Lorain monies to Lorain participants."). Indeed, although the record is not free from contradiction, the district court indicated that the independent plan administrator (appointed pursuant to *Spang I)* would have to decide the damages issue. (App. at 11a-13a). More importantly, the district court denied respondents' motion to alter or amend the judgment in favor of the respondents to include the Chicago and Lorain pension fund surpluses. (App. at 10a-11a). Though the court below cloaked its factual determinations by reference to *Spang I*, (App. at 14a-16a, 18a), the violation of petitioner's due process rights first became discernible only upon the issuance of *Spang II*.

Corporation ("PBGC") and the Internal Revenue Service ("IRS").

The key to the conflict is petitioner's contention that the applicable pension agreements, at the request of the Union, created a Balkanized pension fund, with employees at each of the three plants being entitled only to that portion of the pension assets allocable to that plant. Thus, although all of the pension assets were held for investment purposes in a single trust fund, upon plant closing the employees at one plant were barred by the pension agreement from making use of pension assets allocable to a different plant, even if this meant that they had to suffer a reduction in the pensions that could be provided to them. By the same token, all of the pension assets allocable to that plant were available to be disposed of by the employees at that plant, and no other plant had a claim to those assets. If there was a surplus in pension assets allocable to that plant (as there was on the closing of the Chicago plant) and the employees, through their exclusive collective bargaining representative, chose to trade that surplus back to the petitioner in return for other, immediate cash benefits (as they did in Chicago), no other plant could claim that surplus.

Under ERISA, which was in effect throughout the Chicago closing and thereafter, it is clear that there is more than one "plan" if any part of the pension assets is earmarked or set aside so that it is not available to pay benefits to all participants in the plan. In that case, there are two or more plans, depending on whether there are multiple restrictions on the use of plan assets. For example, Pension Benefit Guaranty Corporation Regulation 29 C.F.R. § 2615.2 provides:

> For purposes of this part (unless otherwise indicated or required by the context)—
>
> "Plan" means a single plan (whether it be a single employer, multiemployer or multiple employer plan),

> as opposed to a number of plans, if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

PBGC has elaborated upon that definition as follows:

> Our determination as to the nature of an entity—whether it is a single plan or an aggregate of single plans—is based on its structure and how it actually operates on an ongoing basis. We look to the documents governing the entity and to relevant evidence of how it has operated and continues to operate. Such evidence may include the reasonable expectations and intent of the parties.
>
> The availability of funds held by an entity to provide benefits on an ongoing basis is a central factor in our analysis. Ongoing restrictions on the use of such funds indicate that the entity may be an aggregate of single plans. For example, an asset account might be maintained for each contributing employer. An employer's account might be credited with its contributions and allocable share of investment losses. It may be possible to restrict use of assets from each such account to pay only the benefits of the employee-participants of the employer maintaining the account. If the evidence shows that payments are effectively restricted, by whatever means, so that there is a minimal risk of funds attributable to the contributions of one employer being used to pay the benefits of another employer's employee-participants, then the entity is an aggregate of single plans.

45 Fed. Reg. 55,636 (Aug. 20, 1980).[23]

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[23] As PBGC's explanation makes clear, the inquiry into the existence of one plan or multiple plans is extremely fact-intensive, which underscores the need for an evidentiary hearing in this case.

The Internal Revenue Service takes the same position under section 414(l) of the Internal Revenue Code, added by ERISA. *See* 26 C.F.R. § 1.414(l)-1(b)(1); Prop. Reg. 26 C.F.R. § 1.410(b)-7(a), 16 Pens. Rep. (BNA) 281 (Feb. 13, 1989);[24] Prop. Reg. 26 C.F.R. § 1.401(a)(26)-2(b), 54 Fed. Reg. 21,437 (May 18, 1989) (same). Indeed, the regulations of the Internal Revenue Service directly address the situation where, as here, the pension assets are held in a single trust fund but are not all available to pay benefits to all participants:

> [M]ore than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if . . . all or part of the assets are invested in one trust with separate accounting with respect to each plan.

26 C.F.R. § 1.414(l)-1(b)(1). In this case, there was separate accounting for the pension funds allocable to the three separate plants ever since the Union requested it and won it as a requirement of the pension agreement in 1970. (App. at 16e-17e).

Under ERISA, therefore, there can be no doubt that, upon the closing of the Chicago plant, when the Chicago and Lorain employees were restricted to enjoying two separate pools of assets, there existed two "plans." One consisted of the assets allocable to the Chicago plant and was subject to the exclusive disposition of the Chicago

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[24] Proposed Regulation 1.410(b)-7(a) provides:

Separate asset pools are separate plans. Each single plan within the meaning of section 414(l) is a separate plan for purposes of section 410(b). *See* § 1.414(l)-1(b). For example, if only a portion of the assets under a defined benefit plan is available, on an ongoing basis, to provide the benefits of certain employees and the remaining assets are available only in certain limited cases to provide such benefits (but are available, in all cases, for the benefits of other employees), there are two separate plans.

employees; the other consisted of the assets allocable to the Lorain plant and was subject to the exclusive disposition of the Lorain employees. By holding that the 1980 Lorain agreement prohibited reversion of surplus not only from the Lorain "plan" but also from the Chicago "plan" (in which the Lorain employees were never participants, which did not consist of any money contributed on their behalf, and which previously had been bargained back to petitioner by the Chicago employees), the court below disregarded ERISA and placed itself in conflict with the United States, as reflected in the regulations of the responsible federal agencies, the PBGC and the IRS.[25]

In the court below, respondents claimed that the existence of two plans was contrary to the "shared view" of the parties throughout the litigation that there was one plan, and they persuaded the court below to invoke the doctrine of judicial estoppel. That claim was based on petitioner's consistent representations that the Chicago surplus was held in the same *trust fund* as the Lorain pension assets. Indeed, in its opinion, the court below never quoted petitioner as admitting that there was one plan; it quoted petitioner as admitting that there was only one *trust fund*. (App. at 17a-18a). As the IRS regulation quoted above makes clear, however, the commingling of assets in a single trust fund does not in any way contradict the conclusion that there is more than one plan. Thus, while there was a "shared view" that there was a single trust fund, there never was a "shared view" that there was a single plan. The reason why respondents had not previously heard the argument about multiple plans was quite simply that the issue had never been litigated. The court's invocation of judicial estoppel is the ultimate irony: how

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[25] Needless to say, the court below neither asked for nor received the benefit of the PBGC's or the IRS's views on this question, because the court below decided the issue without any litigation or decision in the district court.

can a party be estopped from reversing its position on an issue that has never been litigated?[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[26] Because the damages issue has never been litigated, petitioner has never been afforded an opportunity to make its case for separate plans. Petitioner has always recognized that respondents sought as damages both the Lorain and the Chicago surpluses, but that surely did not constitute an admission that, if respondents won summary judgment as to liability, they were entitled to all they sought as damages. As explained in detail in the Statement, *supra*, at ¶ 2, petitioner never conceded that respondents were entitled to what they sought in damages; it adamantly maintained that they could never reach the Chicago surplus.

APPENDIX A

Filed: May 17, 1990

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-3573

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

v.

SPANG AND COMPANY

Matthew A. Delgrosso, James P. Blair, Lester Ware, Jimmie Mines, Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Sr., Gilbert Weese, Larry K. Hill, Charles G. Church, Jr., John R. Alves, Barry K. Racz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, and Hubert J. Lee, as well as the unnamed plaintiff vested participants,

Appellants

Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil Action No. 82-2672)

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Petitioners

v.

SPANG AND COMPANY,

Respondent

HONORABLE ALAN N. BLOCH,

Nominal Respondent

On Petition for Writ of Mandamus
Related to Western District of Pennsylvania
Civil Action No. 82-2672

Argued February 6, 1990

Before: GREENBERG, SCIRICA and SEITZ,
Circuit Judges
(Filed May 17, 1990)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

In this case, pension plan participants former employees at the Lorain, Ohio plant of Spang & Company, appeal from a July 18, 1989 order of the United States District Court for the Western District of Pennsylvania, and petition this court for a writ of mandamus to compel the district court to comply with our earlier judgment in *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). We hold that the July 18, 1989 order is not final and thus is not appealable. We believe, however, that in this difficult and complex case, the district court has not fully implemented the judgment

in *Spang*. Therefore, we will grant the petition for a writ of mandamus.

I.

This case involves the allocation of surplus assets from a pension plan maintained under pension agreements between Spang and the United Steel Workers ("USW"). Spang operated ferro slag plants in Chicago, Illinois and Lorain, Ohio, which the company closed in 1979 and 1982 respectively. Nonvested participants from the Lorain plant sued Spang in 1982 alleging that the company refused to allocate surplus assets for the benefit of plan participants in violation of § 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104 (1982), and § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1982).

By orders dated June 1, 1984 and August 29, 1984, the district court granted summary judgment to Spang on all counts. App. at 1079, 1094. In a 1985 appeal, we held that the surplus assets could not revert to Spang nor were they available exclusively to the nonvested participants. *Spang*, 796 F.2d at 938. Therefore, we affirmed in part, reversed in part, and remanded the case with the following direction:

> The district court, consistent with the foregoing opinion, is directed to: 1) grant summary judgment in favor of Delgrosso [the nonvested participants] on Counts III and IV[;] 2) reform the Spang Plan to provide that reversion to Spang of the Fund surplus is barred; 3) appoint a representative for the vested participants to represent them in the selection of an independent Plan administrator; and 4) under appropriate procedures, appoint an independent administrator of the Plan in the place of Spang.

Id. at 938-39.[1] Since then, the district court has presided over four status conferences and issued several orders, culminating with an order dated July 18, 1989, which provided:

> [I]t appearing to the Court that no further action is contemplated by this Court at this time in the above captioned matter,
>
> IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.
>
> Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if this order had not been entered.

App. at 1267.

The vested and nonvested participants from the Lorain plant ("Participants") appeal from the order contending that the district court improperly and prematurely closed the case without fulfilling the *Spang* directives. Spang argues that the order is not final and appealable because it neither resolves the outstanding issues in the case nor precludes the parties from initiating further proceedings.

With certain exceptions not relevant here, the courts of appeals have jurisdiction under 28 U.S.C. § 1291 (1982) to review only final decisions of the district courts. *Demenus v. Tinton 35 Inc.*, 873 F.2d 50, 52 (3d Cir. 1989). A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The most important of the competing considera-

[1] The certified judgment, dated July 30, 1985, was issued in lieu of a formal mandate on June 2, 1986, after Spang's petitions for rehearing and certiorari had been denied. *See* App. at 1171-74.

tions in determining finality are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

In *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), we considered the appealability of an order that denied cross motions to dismiss, "administratively terminated" the action pending arbitration, and authorized reinstatement upon motion by either party. We held that the order was not a final judgment because it permitted reinstatement and clearly contemplated the possibility of further proceedings. *Id.* at 403.[2]

Similarly, the order in this case permits reinstatement and contemplates the possibility of future proceedings. The order does not purport to end litigation on the merits and the parties agree that it does not determine any issues or resolve the entire case. We recognize that the conduct of the district court raises the question whether the order effectively, if not expressly, brings the case to a close. On balance, however, we believe that the order is not final for purposes of § 1291 and that the Participants' allegations regarding the conduct of the district court are properly addressed through a petition for a writ of mandamus.

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[2] Applying the *Enelow-Ettelson* doctrine, we found, however, that because the underlying action was one at law, that part of the order amounted to a stay pending arbitration was appealable under 28 U.S.C. § 1292(a)(1) (1982). *See Patten*, 819 F.2d at 403-05. Subsequently, the Supreme Court overturned the cases establishing the *Enelow-Ettelson* doctrine and held that "orders granting or denying stays of 'legal' proceedings on 'equitable' grounds are not automatically appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287 (1988). *But see* 9 U.S.C. § 15 (1988) (Appeals).

II.

The Participants contend that a writ of mandamus should issue in this case because, they argue, the district court has refused to resolve questions that are essential to fulfilling the *Spang* mandate: whether the Chicago assets are included in the Fund surplus and whether the Chicago employees are eligible to share in the surplus. Spang responds that the district court has carried out each of the *Spang* directives and that the *Spang* decision made clear that the Fund did not include the Chicago surplus. Moreover, Spang asserts that the Participants have foregone other opportunities for review.

"The decision to issue a writ of mandamus is largely committed to the discretion of the issuing court." *Citibank, N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978). The writ is an extraordinary remedy, however, and should be issued only in exceptional circumstances. A party seeking the writ has the burden of demonstrating that its right to the writ is "'clear and indisputable.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)). Moreover, the party must have no other adequate means to attain the desired relief. *Helstoski v. Meanor*, 442 U.S. 500, 505 (1979) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976)).

Courts understandably have been reluctant to issue writs because the action has "the undesirable consequence of making a district court judge a litigant." *Citibank*, 580 F.2d at 86 (citing *Kerr*, 426 U.S. at 402). More importantly, granting the writ in less than exceptional circumstances could encourage piece-meal litigation that would frustrate Congress' intent that appellate courts review only the final judgments of the district courts. *Id.* Nonetheless, courts have consistently issued the writ when a district court has failed to adhere to an appellate court mandate. *Id.* at 86-87 (citations omitted); *see Gulfstream Aerospace Corp.*, 485 U.S. at 289 (federal courts have traditionally used writ only

to confine district court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has duty to do so). To do otherwise "would severely jeopardize the supervisory role of the courts of appeals within the federal judicial system." *Citibank*, 580 F.2d at 87.

Our judgment directs the district court to accomplish four tasks: 1) to grant summary judgment to the nonvested participants on Counts III and IV, an ERISA count and the LMRA count; 2) to reform the Plan so that reversion of the surplus to Spang is barred; 3) to appoint a representative for the vested participants; and 4) to appoint an independent administrator of the Plan in place of Spang. *Spang*, 769 F.2d at 938-39.

The district court granted summary judgment on Counts III and IV at the first status conference on June 23, 1986. App. at 1185-87. By order dated August 12, 1986, the court appointed a representative for the vested participants. App. at 1218.

Spang claims that it reformed the Plan by deleting § 12.3(e), contained in the Pension Plan dated November 1, 1980 ("1980 Plan"), from its 1988 Pension Plan for Lorain.[3] In *Spang*, we determined that § 12.3(e),[4] which permitted reversion of surplus assets to Spang, was inconsistent with the anti-reversion provision in § 12.6 of the 1980 Pension Agreement between Spang and the Lorain

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[3] Spang had unilaterally drafted the 1980 Plan to comply with ERISA's requirement of a permanent plan document. *See Spang*, 769 F.2d at 930 (citing ERISA, 29 U.S.C. § 1102(a)(1) (1982)).

[4] Section 12.3(e) provided:

> To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

1980 Plan, § 12.3(e), App. at 941.

employees ("1980 Pension Agreement").[5] Therefore, we held that Spang had breached its fiduciary duty under ERISA, 29 U.S.C. § 1104, by failing to administer the Plan in accordance with the 1980 Pension Agreement. *Id.* at 935-36, 937.

Spang's claim that the Plan has been reformed is problematic. First, Spang deleted § 12.3(e) from a 1988 Pension Plan that purports to apply only to the Lorain employees. A 1988 Pension Plan drafted by Spang for the Chicago employees still includes the reversion provision, at § 12.2(e). *See* App. at 1337. Absent a district court order, it is unclear whether Spang's actions constitute the reform envisioned by this court. Second, and more importantly, the *Spang* court directed the district court to reform the plan. Clearly, the district court has not done so nor has it entered any order to confirm that the changes made by Spang constitute reform within the meaning of the judgment. Moreover, the district court's comments at one of the status conferences suggest that it intended to place responsibility for reformation on the plan administrator. *See* Second Status Conference (December 22, 1986), Transcript at 3, App. at 1221 ("In accordance again with the circuit's directions, he [the Plan administrator] is to see to it, first of all, that the plan is changed to prevent any reversion to Spang of any fund surplus.") Therefore, we fail to find any indication that the district court has carried out this aspect of the mandate.

The crux of the Participants' writ petition concerns the execution of the last of the four directives. By order

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[5] Section 12.6 provided in part:

> The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13.

1980 Pension Agreement, § 12.6, App. at 860.

dated February 5, 1987, the court appointed Dale B. Grant as independent Plan administrator, App. at 1230. In an August 5, 1988 letter, however, Grant informed the court that she would not serve because she was unable to secure fiduciary insurance to cover litigation by or on behalf of Spang or the Chicago participants. Grant's letter was no surprise. Her insurance problem had been discussed at the third settlement conference on June 26, 1987, App. at 1238-42, and again at the fourth settlement conference on July 8, 1988, App. at 1248-49. Resolution of the questions regarding the Chicago assets and participants would have alleviated Grant's litigation concerns. Grant wrote:

> In this context, without insurance coverage, I cannot serve as plan administrator, unless the Court is going to make a determination as to whether or not the plan assets include assets that were originally attributable to the Chicago participants and whether or not the Chicago participants are eligible to share in the allocation of the plan assets. If the Court were to make these determinations and also confirm any allocation that I might propose after appropriate notice to all interested plan participants, I would be able to serve without further insurance coverage.

Letter from Dale B. Grant to District Court (Aug. 5, 1988), App. at 1399-1400. Since then, no progress has been made in acquiring comprehensive fiduciary insurance or in finding someone willing to serve as Plan administrator under the circumstances.

Thus, at the time the district court entered its July 18, 1989 order, the court had neither confirmed the reformation of the Plan nor secured the services of a Plan administrator. Moreover, although the district court entered summary judgment on Counts III and IV, it did not specify the relief granted. In July 1986, the nonvested participants filed a "Motion to Clarify or, in the Alternative, to Amend an Order Entered Pursuant to the Mandate of the Third Circuit." They contended that they were entitled to "all

the monies in the pension . . . . including those derived from 'Chicago' contributions" and that "[t]here is no subcategory of 'Chicago' and 'Lorain' assets. The Court should clarify this matter once and for all in its Order." App. at 1198-99. On July 28, 1986, the district court denied the motion.[6] App. at 1217. It appears, therefore, that final resolution of three of the four *Spang* directives hinges on the status of the Chicago assets and employees. The district court has made it clear that it will not decide these issues. The Participants, the representative for the vested participants, and the administrator appointee repeatedly asked the district court to address the issues and in each instance, the court steadfastly refused to do so. At the first conference, the court stated:

> [T]he Circuit seems to have given me four instructions, which I intend to follow, and they remanded it only for that purpose . . . and those are the only four things I intend to do, and they didn't tell me to decide who is entitled to what at all.
>
> . . . .

[6] Spang contends that the petition for a writ of mandamus should be denied because the Participants failed to appeal the July 28, 1986 order under 28 U.S.C. § 1291 (1982) (pursuant to the collateral order exception) or 28 U.S.C. § 1292(b) (Supp. V 1987) (by certification of the order for appeal on a controlling question of law). The Supreme Court has stated that an order which does not finally resolve litigation is nonetheless appealable under the collateral order doctrine if it "'conclusively determine[s] the disputed question,'" "'resolve[s] an important issue completely separate from the merits of the action,'" and is "'effectively unreviewable on appeal from a final judgment,'" *See Gulfstream Aerospace Corp.*, 485 U.S. at 276 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Spang fails to explain how the July 28, 1986 order satisfies this test or what controlling question of law is implicated in the order. We find no merit in Spang's contention.

> I'm going to appoint a new administrator and an independent administrator. He or it is going to make those decisions . . . .
>
> . . . .
>
> [A]s I see the remand, they haven't remanded it for me to make any of those decisions.

First Status Conference (June 23, 1986), Transcript at 11-13, App. at 1185-87. At the second conference, the court responded to questions regarding the Chicago assets as follows:

> There is no way for me to interpret what the circuit meant when they say fund. I do not know what was in their mind or not. Now, you know, if there is a legal question involved as to who is entitled to share in the fund, I can make that decision. But I cannot make it on the basis of what the circuit intended. I do not know any more than you do what they intended . . . .
>
> . . . .
>
> Wouldn't the appropriate method of proceeding be that, once we have an independent plan administrator, he is going to make some decision on that question?

Second Status Conference (Dec. 22, 1986), Transcript at 9, App. at 1227. Ms. Grant attended the fourth conference, at which the court commented:

> [I]t was remanded to this Court with the following directions. . . . That's all it was sent back to this Court to do, and not to decide any other issues. . . . And, so, I guess we then get back down to whether the independent administrator that the Court has appointed or wants to appoint is willing under those circumstances to assume that responsibility.
>
> . . . .
>
> I don't have authority to do anything else or to decide anything else. . . . And if you are unwilling to accept as

> the administrator of the plan under these circumstances, then I'm going to have to inform the Circuit that we have been unable to get . . . an independent plan administrator to take over those responsibilities on the basis of the exceptions and the only proposed insurance coverage that's available. . . . [T]hen it's up to the Circuit to do whatever they want to do about it.
>
> . . . .
>
> It's been remanded to me for a very limited purpose . . . and I intend to carry out that remand and not to do anything more than they remanded it to me to do. . . . I don't intend to get into that unless the Circuit tells me to get into it.
>
> . . . .
>
> And, you know, what legal problems that causes for all of you are things that you're going to have to consider, and how to properly raise those legal questions.

Fourth Status Conference (July 8, 1988), Transcript at 6-7, 9-12, 15, App. at 1252-61.

We believe that the district court has adopted too narrow a view of its authority on remand. In *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3d Cir. 1985), we considered whether the district court had deviated from our mandate by failing to rule on outstanding issues on remand. *Id.* at 948. We stated that a trial court must implement both "the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* at 949. When an appellate court directs the district court to act in accordance with the appellate opinion, as we did in *Spang*, the opinion becomes part of the mandate and must be considered together with it. *Id.* at 949-50 (quoting *Noel v. United Aircraft Corp.*, 359 F.2d 671, 674 (3d Cir. 1966)). Moreover, the district court "may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision." *Id.* at 950. Thus, the

court is free to make any order not inconsistent with the appellate decision as to any question not settled by that decision. *Id.*

Under the circumstances, the district court clearly had the authority to decide whether the Chicago assets are part of the Fund and whether the Chicago employees are eligible to participate in the Fund. The district court's refusal to make these determinations has left the case hopelessly stalled. The plan is without an administrator, and it is unclear what relief is available to the nonvested participants on their summary judgment and whether Spang's reformation of the 1988 Lorain Plan suffices. We find, therefore, that the district court has not fully implemented our judgment in *Spang* and that the Participants have a "clear and indisputable" right to a writ of mandamus.

III.

When faced with a petition for a writ of mandamus, "it is for this court to construe its own mandate, and to act accordingly." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *see Hartford Accident & Indemnity Co. v. Gulf Insurance Co.*, 837 F.2d 767, 774 (7th Cir. 1988). In *Spang*, we directed the district court to "reform the Spang Plan to provide that reversion to Spang of the Fund surplus is barred." 769 F.2d at 938-39. In our certified judgment, we stated: "It is further ordered and adjudged that any surplus assets may not revert to Spang nor are they available exclusively to Delgrosso [the nonvested participants]." July 30, 1985 Judgment (issued June 2, 1986), App. at 1173-74.

Considering the opinion and judgment together, we cannot agree with Spang's assertion that our decision was confined to the Lorain surplus. Our reference to the Lorain plant at the beginning of the opinion was not intended as a definition of the Fund – as Spang asserts – but rather as a description of the participants who had

initiated suit. *See Spang*, 769 F.2d at 929 ("the non-vested participants in the Spang pension plan (the Fund) for its Lorain, Ohio ferro slag plant . . . ." (footnote omitted)). Moreover, we fail to see how our statement that "[s]ubsequent to the effective date of the 1980 Pension Agreement . . . . the Fund was divided into two funds, ..." *id.* at 930, indicates that our decision did not apply to the assets remaining after the purchase of both the Chicago annuity and the Lorain annuity.

Spang cites the following passage from our opinion as support for its position: "[A]fter provision for payment of the pensions, a surplus of over $100,000 remained in the Fund. It is the surplus which has given rise to this action." *See id.* at 931. Spang contends that this amount represents the company's contributions to the Lorain fund. Our reference, however, was to "surplus," not "contributions." Moreover, we note that this figure was used by the plaintiffs in their amended complaint and quoted by the district court in its June 1984 opinion. *See* Amended Complaint ¶ 30, App. at 11 ("At the time of plant closure, there was in excess of 100,000.00 dollars in the pension fund beyond that needed to cover vested benefits."); *Delgrosso v. Spang & Co.*, C.A. No. 82-2672 (W.D. Pa. June 1, 1984), App. at 1066 ("[P]laintiffs assert that, upon plant closing, over $100,000 remained in the pension fund beyond the sum needed to cover vested benefits . . . ."). Our use of the phrase "over $100,000." therefore, was merely a reiteration of the plaintiffs' description of the minimum value of the surplus at issue. The passage was not intended, nor can it now be viewed, as a description of a "separate" Lorain surplus.

On the other hand, our frequent use of the terms surplus, assets, and fund without qualification or restriction demonstrates our understanding that the fund included both the Chicago and Lorain assets. As noted above, our judgment expressly prohibited the reversion of "any surplus assets." *See* Judgment, App. at 1173-74.

Spang reminds us that the controversy in the earlier appeal centered on the inconsistency between the reversion provision in the 1980 Plan and the anti-reversion provision in the 1980 Pension Agreement applicable only to the Lorain employees. We do not find this relevant to the question of whether the Fund included both the Chicago and Lorain assets. Moreover, we noted that "[s]ince 1970 *all* pension agreements have contained a clause unequivocally prohibiting any reversion to Spang of its contributions." *Spang*, 769 F.2d at 930 (emphasis added). We concluded that "*any* plan provision permitting reversion of the Plan assets to Spang is not 'in accordance with the documents and instruments governing the plan.'" *Id.* at 935-36 (quoting 29 U.S.C. § 1104(a)(1)(D) (1982) (emphasis added). These statements demonstrate that our opinion cannot be read as narrowly as Spang urges.

The Participants also contend that the equitable doctrine of judicial estoppel bars Spang from now asserting that our judgment applied only to the Lorain surplus. This doctrine precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously asserted position. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.), *cert. denied*, 109 S. Ct. 495 (1988); *see Lewandowski v. National Railroad Passenger Corp. (Amtrak)*, 882 F.2d 815, 819 (3d Cir. 1989); *Murray v. Silberstein*, 882 F.2d 61 (3d Cir. 1989); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953); C. Wright A. Miller, E. Cooper, 18 *Federal Practice and Procedure* § 4477 (1981 & Supp. 1990). Unlike the concept of equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between the litigant and the judicial system, and seeks to preserve the integrity of the system. *Oneida Motor Freight*, 848 F.2d at 419. To permit a party to assume a position inconsistent with a position it had successfully relied upon in a past proceeding "would most flagrantly exemplify . . . playing 'fast and loose with the

courts' which has been emphasized as an evil the courts should not tolerate." *Scarano*, 203 F.2d at 513 (quoting *Stretch v. Watson*, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949), *rev'd in part on other grounds*, 5 N.J. 268, 74 A.2d 597 (1950)).

In its brief to this court in the 1985 appeal, Spang asserted:

> All pension trust monies which remained after the Chicago employees were awarded their pension benefits remained in the pension trust fund. (A. 276, 688-689). *The current pension trust is therefore comprised in substantial part of funds attributable to Chicago employees* (A. 688-689).

Brief for Spang & Co. at 14 (Jan. 21, 1985), *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985) (No. 84-3618, No. 84-3644) (emphasis added), *cert. denied*, 476 U.S. 1140 (1986). The brief also contained the following declaration:

> Spang does not concede that there exists a surplus of pension assets attributable to the Lorain, Ohio facility. *Much of the pension trust consists of funds and investment growth attributable to Spang's slag processing facility in Chicago, Illinois which was closed in 1979* (A. 688-689). Under no possible interpretation are Appellants, former Lorain, Ohio employees, entitled to assets attributable to work performed by former Chicago employees.

Id. at 10 n.3 (emphasis added).[7]

---

[7] According to Spang, the last sentence from this quotation demonstrates that it did not "cede" the combined surplus to the appellants in the initial appeal. While that may be, it is irrelevant to the question before us. The passage clearly shows that Spang believed and asserted that the surplus at issue in the 1985 appeal consisted at least in part of funds attributable to the Chicago facility.

Similarly, in its brief to the district court in support of summary judgment, Spang stated:

> Even if Plaintiffs are somehow deemed entitled by the Court to more than their accrued pension benefit, they are not entitled to all remaining funds in the pension trust.
>
> *As previously noted, a substantial portion of the current pension trust fund balance is attributable to the carryover of surplus from the Chicago closing.*

Brief of Spang & Co., at 33, *Delgrosso v. Spang & Co.*, C.A. No. 82-2672 (W.D. Pa. 1984) (emphasis added); *see also* Pretrial Narrative Statement of Spang & Co. at 5, *Delgrosso v. Spang & Co.*, C.A. No. 82-2672 (W.D. Pa. 1984), App. at 634 ("[T]wo prior facility closings in Homestead, Pennsylvania and Chicago, Illinois provided employees of those facilities with their pension benefits .... Remaining surplus after payment of the foregoing sums was retained in the pension fund.")

Clearly, Spang's position in this phase of the litigation is inconsistent with the position it assumed in the earlier phases of this litigation. Moreover, application of the doctrine of judicial estoppel is particularly appropriate in situations like this, where the party benefited from its original position. *Murray*, 882 F.2d at 66; *see Scarano*, 203 F.2d at 513. Although Spang failed to persuade this court in 1985 that the surplus should revert to the company, it was successful in convincing us that the surplus was not available exclusively to the nonvested participants. *See Spang*, 769 F.2d at 938. We concluded that the parties to the 1980 Pension Agreement could not have anticipated the existence of such a large surplus and could not have intended the surplus to be distributed among the nonvested participants. *Id.* at 936-37.

Under the circumstances, therefore, we hold that the judgment in *Spang* applies to the surplus assets of both the Lorain and Chicago facilities. We are unable to point to

anything indicating that the *Spang* panel considered or decided the rights of the Chicago employees. As we have noted, however, a district court has the authority to decide issues on remand that were not disposed of by the appellate court. *See Bankers Trust Co.*, 761 F.2d at 950. We recognize the extensive efforts of the district judge in this complex case. Nonetheless, the *Spang* judgment could not be discharged absent a decision on the questions regarding the Chicago employees and the Chicago assets. We believe the district court should have addressed these issues.

IV.

For these reasons discussed, we hold that the order of the district court dated July 18, 1989 is not final and appealable under 28 U.S.C. § 1291. Therefore, we will grant Spang's motion to dismiss the appeal (No. 89-3573).

We will grant the Participant's petition for a writ of mandamus (No. 89-3677). We direct the district court to reopen the case, to carry out each of the directives set out in our prior judgment, and to issue appropriate orders with respect to each directive, all in accordance with the foregoing opinion and the opinion in *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). Furthermore, we direct the district court to resolve all issues not expressly or implicitly disposed of by this court, as is necessary to effectuate the judgment and in a manner consistent with both opinions, including but not limited to questions involving the Chicago employees[8] and whether Spang has appropriated any part of the surplus.

---

[8]This includes but is not limited to the issues of notice and representation for the Chicago employees and whether the Chicago employees are entitled to participate in any distribution.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Petitioners

v.

SPANG AND COMPANY,

Respondent

THE HONORABLE ALAN N. BLOCH,

Nominal Respondent

ON PETITION FOR WRIT OF MANDAMUS

(Related to W.D. Pa. Civ. No. 82-02672)

Present: Greenberg, Scirica and Seitz, *Circuit Judges*

ORDER

Upon consideration of the Petition for Writ of Mandamus, the Respondent's Answer, the parties' briefs and the arguments of counsel on February 6, 1990,

It is hereby ORDERED, ADJUDGED and DECREED by this Court that the prayer of petitioners is granted and the Clerk of this Court is directed to issue a writ of mandamus in accordance with the opinion of this Court. Costs taxed against the respondent insofar as the petition for writ of mandamus.

/s/ ANTHONY J. SCIRICA

Circuit Judge

DATED: May 17, 1990

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR
LESTER WARE, JIMMIE MINES, JR., JOE HENRY,
ROBERT C. TRAINER, JAY T. RICHLER, ROBERT
HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE,
LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R.
ALVES, BARRY K. RALZ, DONALD LEE ADAMS,
CHARLES WOODRUM, RICHARD W. MARTINEAU,
and HUBERT J. LEE,

Petitioners

v.

SPANG AND COMPANY,

Respondent

THE HONORABLE ALAN N. BLOCH,
Nominal Respondent

(Related to W.D. Pa. Civ. No. 82-02672)

WRIT OF MANDAMUS

UNITED STATES OF AMERICA,
THIRD JUDICIAL CIRCUIT: SS

To the Honorable Alan N. Bloch, United States District Judge for the Western District of Pennsylvania

GREETINGS:

Whereas the Honorable Alan N. Bloch having entered an order dated July 18, 1989 which provided

> [It] appearing to the Court that no further action is contemplated by this Court at this time in the above captioned matter,
>
> IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.

Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if this order had not been entered;

and,

Whereas former employees of the Lorain, Ohio plant of Spang & Company who are pension plan participants having filed a petition for writ of mandamus on October 16, 1989 requesting that the Honorable Alan N. Bloch be compelled to take further action to comply with this Court's prior judgment in *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied* 476 U.S. 1140 (1986); and,

Whereas, the respondent having filed an answer and the matter having been briefed together with appeal No. 89-3573 and argued by counsel on February 6, 1990; and,

Whereas, the Court on this date has entered an Order directing the Clerk of this Court to issue a writ of Mandamus in accordance with its opinion;

Now therefore, the Honorable Alan N. Bloch, is hereby *REQUIRED* and *DIRECTED*, immediately upon receipt of this WRIT, and without unreasonable delay, to reopen the case, to carry out each of the directives set out in the prior judgment of this Court, and to issue appropriate orders with respect to each directive, all in accordance with the foregoing opinion and the opinion in *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied* 476 U.S. 1140 (1986), and is furthermore *REQUIRED* and *DIRECTED* to resolve all issues not expressly or implicitly disposed of by this Court as necessary to effectuate the judgment and in a manner consistent with both opinions, including but not limited to questions involving the Chicago employees and whether Spang has appropriated any part of the surplus.

For the Court,

/s/ SALLY MRVOS

Clerk, United States Court of
Appeals for the Third Circuit

Dated: May 17, 1990

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 89-3573

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

v.

SPANG AND COMPANY,

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE, as well as the unnamed plaintiff vested participants,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT PENNSYLVANIA

(D.C. Civ. Action No. 82-2672)

Present: Greenberg, Scirica and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel February 6, 1990 together with the petition for writ of mandamus docketed at No. 89-3677.

On consideration whereof, it is now here ordered and adjudged by this Court that the appellee's motion to dismiss the appeal is granted. Costs taxed against the appellants insofar as the within appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS

Clerk

May 17, 1990

Certified as a true copy and issued in lieu of a formal mandate on June 26, 1990

Test:

/s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3618

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Appellants

v.

SPANG AND COMPANY

Appellee

No. 89-3644

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Cross-Appellees

v.

SPANG AND COMPANY

Cross-Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. No. 82-2672)

Argued June 12, 1984

BEFORE: WEIS, GARTH and STAPLETON, *Circuit Judges*

(Opinion filed July 30, 1985)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

Matthew Delgrosso, et al, the non-vested participants[1] in the Spang pension plan (the Fund) for its Lorain, Ohio ferro slag plant, sought a ruling which would prevent Spang & Company from appropriating to itself the surplus assets of the Fund and would instead order those assets to be distributed among the non-vested participants. The

[1] Throughout the opinion we will refer to the non-vested participants, the plaintiffs, as "Delgrosso."

district court rejected Delgrosso's claims and entered summary judgment for Spang, clearing the way for Spang & Co. to receive the surplus assets of the Fund remaining after Spang had funded all vested benefits through insurance contracts. Delgrosso appealed to this Court.

Because we conclude that Spang violated its fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104 by unilaterally amending the pension plan to provide for a reversion of assets to Spang, we reverse so much of the judgment of the district court which held otherwise, and which did not provide for an allocation of the surplus funds among vested and nonvested participants.

I.

Most of the underlying facts are undisputed. The Fund has been maintained since 1963 under a succession of collectively bargained pension agreements between Spang and United Steel Workers (USW). The most recent of these pension agreements was an agreement effective for the period November 1, 1980 to November 1, 1983 (the Pension Agreement). Under earlier agreements, the Fund was to be maintained as a *defined contribution* plan – that is, Spang was required to contribute $.40 per hour worked for each employee, and the employee would receive a pension in the amount of however much pension the Fund could buy once he retired.

In 1974, the plan was converted into a *defined benefit* plan, under which Spang was obligated to maintain funding for the plan at whatever level was actuarially necessary in order to provide the guaranteed benefits specified under the collective bargaining agreement. As it worked out, the earlier contributions which Spang had been required to pay into the Fund have always been adequate to fund the plan's pension obligations and Spang has made no contributions since 1974. Thus, all contributions to the Fund were contributions under a *defined contributions*

plan and none were made under an actuarially based defined benefit plan.

A.

Since 1970 all pension agreements have contained a clause unequivocally prohibiting any reversion to Spang of its contributions. This clause appears in the 1980 Pension Agreement:

> 12.6 The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.

Section 13 of the Pension Agreement provides priorities for funding of benefits in case of insufficient assets upon plan termination. Section 13.3 also provides:

> 13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:
>
> (a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

For the purpose of this partial termination Section, those Participants who are on layoff and if recalled would not have a break in Continuous Service for pension purposes will be considered as active Participants for the allocation under (d) above.

Subsequent to the effective date of the 1980 Pension Agreement, but *prior to* its expiration date, several significant events occurred. First, the Fund was divided into two funds, one for each of Spang's two ferro slag plants. The fund covering employees at the Chicago, Illinois plant was terminated, as operations at the location were terminated in 1979. Second, to comply with ERISA's requirement of a permanent plan document, 29 U.S.C. § 1102,[2] Spang unilaterally drafted a new plan (the Plan). Third, Spang closed its Lorain, Ohio plant and purchased full benefit annuity contracts for all vested participants, as well as pro-rata deferred annuity contracts for the plaintiffs, the nonvested participants. A surplus of over $100,000 remained in

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[2] 29 U.S.C. § 1102(a)(1) provided in relevant part:

§ 1102. Establishment of plan

Named fiduciaries

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. . . .

the Fund after fully funding these annuities. It is this surplus which has given rise to this action.

B.

The Plan adopted by Spang incorporated two significant changes from the 1980 Pension Agreement, which was still in effect at the time Spang drew and adopted the Plan. First, the prohibition against reversion to Spang was removed, and the Plan specifically provided for reversion to Spang of Spang's earlier contributions:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Section 12.3(e). Second, the provision that remaining assets be distributed among non-vested participants was amended to provide distribution to non-vested participants only to the extent benefits had accrued by the time of plant closing:

> (4) The remaining assets, if insufficient to provide for all remaining accrued benefits, will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph (4).
>
> * * *
>
> Such allocation shall not, however, be deemed to increase any accrued benefit nor be considered to create a benefit supplement.

Section 12.2. The Spang prepared Plan also allowed the Fund to finance health insurance premiums that Spang was under an independent obligation to finance on its own.

In order to support its contention that section 13.3 of the 1980 Pension Agreement was not intended to authorize a distribution of the Fund surplus to the non-vested employees, Spang filed affidavits and documents relating to the negotiating history of section 13.3. According to these documents, in 1970 USW sought ten year vesting in the pension fund. While rejecting 10 year vesting, Spang offered a provision which would result in the vesting of *all* employees upon a permanent termination of a plant location. Spang, contrary to Delgrosso's assertion, claims that this negotiating history governs the interpretation of section 13.3 of the Pension Agreement, and supports its contention that the pensions for non-vested participants, such as Delgrosso, are limited to only a fraction of full pension benefits.

C.

Delgrosso sought neither arbitration nor retirement board review of his claims,[3] but rather filed a four count complaint in federal court. The first count alleged that Spang's refusal to allocate the entire surplus to Delgrosso violated its fiduciary duty under ERISA, 29 U.S.C. § 1104(a)(1)(d). Delgrosso therefore sought an order directing Spang to comply with section 13.3 of the 1980 Pension Agreement. He also sought damages for delay.

The second count alleged that Spang intended to appropriate the surplus upon expiration of the 1980 Pension Agreement, again in violation of ERISA, and sought, inter alia, an immediate allocation of the surplus to the non-vested participants as well as the appointment of an independent administrator.

Count III alleged that the Plan promulgated by Spang violates the 1980 Pension Agreement and thus violates

[3] Section 11.2 of the 1980 Pension Agreement provides for grievance and arbitration of a dispute over "any person's right to a pension or the amount of his pension."

Spang's fiduciary duty under ERISA. This count sought reformation of the Plan and appointment of an independent administrator.

Count IV alleged a violation of the Labor Management Relations Act (LMRA) § 301(a), 29 U.S.C. § 185(a), in that Spang's unilateral amendment of the Plan violated its collective bargaining agreement. This count also sought reformation of the Plan and appointment of an independent administrator.

Spang moved to dismiss the complaint for failure to exhaust contractual remedies. The district court denied this motion, finding that on the pleadings, Delgrosso alleged statutory as well as contractual claims. Both parties then filed cross motions for summary judgment. The district court granted summary judgment to Spang on all four counts.

The district court held that Spang was entitled to the surplus monies in the Fund. It reasoned that Spang had amended its Plan to permit reversion to Spang of the Fund's surplus and that ERISA allowed such a reversion if the Plan permitted it. The district court went on to hold that since ERISA permitted a reversion of such monies to the employer, here Spang, the Plan was not required to adhere to a collectively bargained clause which forbids such a reversion. In so holding, the district court rejected Delgrosso's claim to the surplus. It found the contract clause (section 13.3 of the Pension Agreement) ambiguous, and it interpreted the expressions of bargaining intent to require only that non-vested participants receive pensions pro-rated for their actual years of service. This interpretation of the contractual provisions was found to bar Delgrosso's LMRA claims for breach of a labor contract as well. Additionally, the district court found that plaintiffs' LMRA claims were contractual, not statutory, and thus could not be asserted absent exhaustion of contractual remedies and an allegation of USW's breach of the duty of fair representation.

II.

Initially, we must address Spang's contention that all of Delgrosso's claims, including the ERISA claims, are barred for failure to exhaust the arbitration remedy provided by the collective bargaining agreement. As we have observed, see note 3, supra, the Pension Agreement provided for arbitration.

This court has recently reaffirmed the national policy in favor of arbitration of labor disputes, and held that this policy applies equally to claims brought under ERISA as to those brought under the LMRA. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985). In *Barrowclough*, we noted the tension between the labor policy favoring arbitration and ERISA's policy of providing a federal forum for pension claimants. See also *Adams v. Gould, Inc.*, 687 F.2d 27 (3d Cir. 1982), *cert. denied* 456 U.S. 1085 (1983). We drew a distinction in *Barrowclough* between claims based on pension rights created by contract, which must be arbitrated, and claims based on purely statutory rights created by ERISA, which may be asserted in federal court directly. See also *Viggiano v. Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276 (3d Cir. 1984). The claims asserted by Delgrosso in this case fall between these two categories; while Delgrosso asserts a breach of ERISA's statutory fiduciary duties by Spang, the essence of the alleged breach of fiduciary duty is a failure to abide by the terms of the Pension Agreement. Spang's compliance with ERISA thus depends on a construction of the Pension Agreement.

We need not decide whether the exhaustion of arbitral remedies requirement generally applicable to labor agreement claims applies to bar the Delgrosso's claims in this case, however, if these claims are not within the ambit of the Pension Agreement's arbitration clause. It is an elementary principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1962).

While we are not unmindful of the principle that labor arbitration clauses are to be construed broadly, see *Barrowclough*, 752 F.2d at 938, we do not find that the arbitration clause in the Pension Agreement can be expanded to include the type of claims asserted by Delgrosso in this case. Unlike the broad arbitration clause at issue in *Barrowclough*, which covered "all disputes arising out of employment or the termination . . . of employment," the Pension Agreement clause covers only "any difference [that arises] . . . as to any person's right to a pension or the amount of his pension."[4]

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[4] The Pension Agreement arbitration clause provides in sections 11.1 and 11.2:

SECTION 11. - ADMINISTRATION AND APPEALS PROCEDURE

11.1 The administration of the pension benefits shall be in the charge of the Company.

11.2 If any difference (other than one arising under Section 6.5) shall arise between the Company and any Employee, Participant, the Union or any person claiming rights hereunder as to any person's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the Union, such question shall be referred to an arbitrator to be selected by the Company and the Union in the manner provided in the Basic Agreement for the selection of arbitrators in the settlement of grievances. The arbitrator shall have authority only to decide the question pursuant to the provisions of this Agreement applicable to the question, but he shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the arbitrator on any such question shall be binding on the Company, the Union, the Participant, and the person who asserted the claim. The fees and expenses of the arbitrator shall be shared by the Company and the Union.

In this case, Delgrosso does not seek to establish his right to a pension; nor does he seek an increased pension. Rather, he claims that in winding up the business of the Fund, the company must distribute leftover assets in a particular way; that is, according to Delgrosso, the Fund may not distribute any assets to the company, and the Fund may distribute excess assets in accordance with the Pension Agreement. These claims, relating to the distribution of excess Fund assets, can by no stretch of language be considered a "difference . . . as to any person's right to a pension or the amount of his pension."

Because the reach of the arbitration clause cannot encompass the claims made by Delgrosso, Delgrosso cannot be compelled to exhaust contractual arbitration remedies under the Pension Agreement and Delgrosso may properly seek relief in the federal courts.[5] *See Schneider Moving & Storage Co. v. Robbins*, ____ U.S. ____, 104 S.Ct. 1844 (1984); *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985); Cf. *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980) (arbitration of disputes as to the "right to a pension or the amount of . . . pension" doesn't cover dispute over company's liability to fund benefits.)

III.

We turn to the validity of Delgrosso's two challenges to the Plan document as drawn by Spang. First, Delgrosso contends that the Plan provision allowing reversion of

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[5] Because we find the Delgrosso's claims to be without the scope of the arbitration clause, we need not address his further argument that Spang's failure to include the arbitration remedy in its Plan description booklets, bars Spang from relying on the arbitration clause.

excess assets to Spang violates section 12.6[6] of the Pension Agreement. Second, Delgrosso contends that the Plan provision for pro-rated pensions upon termination for non-vested participants violates section 13.3 of the Pension Agreement, which allocates all remaining assets to the "remaining participants."[7] Resolution of these issues requires application of the statutory requirements of ERISA as well as principles of contract interpretation.

A.

ERISA creates a fiduciary duty on the part of an employer administering a plan. 29 U.S.C. § 1104 provides:

§ 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

Delgrosso claims that the Pension Agreement is an "instrument governing the plan" and that Spang breached its section 1104(a)(1)(D) duty to administer the Fund in

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[6] The relevant portion of section 12.6 provides: "The contributions made by the Company hereunder may not, under any circumstances, revert to the Company."

[7] See text, supra, for the full text of section 13.3.

accordance with the Pension Agreement, because the Agreement affirmatively bars reversion to the employer. Despite this bar, Spang nevertheless promulgated a plan which provided for reversion to it. Further, Delgrosso points to the prohibited transactions provisions of ERISA, which specifically prohibit the transfer of plan assets to a "party in interest", including the employer. 29 U.S.C. § 1106(a)(1)(D).

Spang counters by referring to ERISA section 1344, which allows such reversion under certain circumstances:

> **Distribution of residual assets; remaining assets**
>
> (d)(1) Any residual assets of a plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied.
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

Spang claims that in this case it has satisfied all the criteria under section 1344 and is therefore entitled to a reversion of the surplus. Resolution of this issue then turns on whether the section 1344(d)(1) requirement, that the plan provides for distribution to the employer, is met by a plan provision unilaterally drafted by the employer, and which is inconsistent with the underlying Pension Agreement.

Spang draws our attention to two cases allowing reversion to an employer under similar circumstances, *Washington Baltimore Newspaper Guild v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion* 729 F.2d 863 (D.C.Cir. 1984); and *In Re C. D. Moyer Trust Fund,* 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion,* 582 F.2d 1273 (3d Cir. 1978). In *C. D. Moyer,* an original plan provision in a defined benefit plan authorized

the employer to alter or amend the pension agreement, providing that in no case should "any of the trust corpus or income be diverted to or revert to" the employer. Despite this provision, the employer amended the plan to provide that "any assets which remain in the Plan because of erroneous actuarial computations after the Plan has satisfied all its liabilities shall be returned to the employer." The district court upheld this amendment despite the restrictive language of the original plan, reasoning that "trust corpus or income" included "only so much of the funds as were necessary to insure full payment of the plan's obligations to participants." 441 F.Supp. at 1132. The court further reasoned:

> Having determined that the amendment is valid, it follows that a refund to the employer meets the requirements of section 4044(d)(1) of ERISA.
>
> This result is consistent with the policies underlying the enactment of ERISA. Employers will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in "an abundance of caution" or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

441 F.Supp. at 1132-33.

In *Washington Star*, the original plan authorized the employer to amend the plan so long as no amendment diverted "any part of" the trust fund to a purpose other than the exclusive benefit of the employees. The original termination provision provided that "In no event shall any of the trust fund be . . . returned to the employer." The employer subsequently amended the termination provisions to provide that "any assets remaining in the trust Fund after the full satisfaction of all liabilities of the Plan

to participants and their beneficiaries shall be returned to the employer." The district court found this amendment to be authorized and effective, reasoning that the "exclusive benefit" language of the amendment authorization adopted not only the fiduciary rule of ERISA, but the § 1344(d)(1) exception to that rule, allowing reversion to the employer, as well. Since the termination provision was effectively amended to allow reversion, such a return of monies to the employer was held not to violate ERISA. The *Washington Star* district court also relied on the *C. D. Moyer* opinion's statement of the policy in favor of returning to the employer contributions in excess of those actuarially necessary to provide the defined benefits.

Even if we were inclined to follow the reasoning of *C. D. Moyer* and *Washington Star*, and we are not persuaded that we should, neither case would require that the surplus assets should revert to Spang. Both cases are factually distinguishable because, unlike *Moyer* and *Washington Star*, the contributions made to the Spang Fund were all made pursuant to a defined *contribution* agreement. Unlike the employers in *Moyer* and *Washington Star*, who paid more into the funds than ultimately proved necessary and who then sought refunds of over payments, Spang here seeks the return of those monies which it was contractually required to pay into the Fund as deferred compensation for its employees. No "overabundance of caution" is involved in this case. Indeed, neither *Moyer* nor *Washington Star* is helpful here because the provision of the Pension Agreement prohibiting reversion, unlike the anti-reversion clauses in those cases, is simply not susceptible to a restrictive interpretation.

Unlike the plans in *Moyer* and *Washington Star*, Spang has never been given *any* authority to amend the Pension Agreement.[6] The reasoning underlying the *Moyer* and

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[6] Spang claims that it became obligated to draft a permanent plan by ERISA § 1102. While 29 U.S.C. § 1102 does so require,

Washington Star cases hinged on a finding that the plans in those cases were effectively amended to allow reversion of plan assets to the employer. Here, the Pension Agreement makes no provision for amendment by Spang and precludes any change in terms during the duration of the Agreement. Under section 1104(a)(1)(D), the company (Spang) must administer the plan according to plan documents, which here includes the Pension Agreement. Since the Pension Agreement specifically provides that "[t]he contributions made by the Company hereunder may not, under any circumstances, revert to the Company," Spang failed to comply with the relevant plan documents.

Thus, any plan provision permitting reversion of Plan assets to Spang is not "in accordance with the documents and instruments governing the plan" under ERISA section 1104(a)(1)(D), and any Plan provision so providing is ineffective.[9] It follows that Spang breached its fiduciary duty by failing to administer the Plan in accordance with the governing documents, i.e., the Pension Agreement.

B.

Delgrosso also contends that the Plan provision granting limited pro-rated pensions to non-vested participants violates the Pension Agreement. The Pension Agreement provides that, upon plant termination and after funding all

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§ 1102 does not authorize Spang to deviate from the terms of the Pension Agreement. See note 2 supra.

[9] We cannot accept the district court's reliance on the second clause of 29 U.S.C. § 1104(a)(1)(D) which adds the qualification "insofar as such documents and instruments are consistent with the provisions of this subchapter." The district court reasoned that the reversion prohibition in the Pension Agreement was "inconsistent" with 29 U.S.C. § 1344(d), which permits reversion *if the plan document so provides.* We cannot agree that a provision in an agreement which prohibits reversion is inconsistent with a statutory provision which permits reversion so long as no contractual provision prohibits it. If anything, § 1344(d) contemplates precisely the opposite result than that reached by the district court.

vested obligations of the plan, "the remaining assets will be pro-rated among the remaining participants." Delgrosso therefore seeks reformation of the Plan to provide for distribution of all surplus assets to the non-vested participants.[10]

The construction to be given section 13.3 is highly problematic. On the one hand, the literal language provides: "the remaining assets will be pro-rated among the remaining participants." On the other hand, such a literal application would lead to absurd results: employees with just a few years of service would receive pensions several times greater than the pensions of employees with thirty years of service. In the context of a defined benefit plan (such as the Spang plan had become), such a residuary clause would create a potential windfall for the non-vested participants. Therein lies the problem: when section 13.3 was drafted in 1970, benefits were to be paid according to *contributions* made on behalf of each employee. Each vested employee would receive a share of the total assets of the Fund based on contributions made on his behalf, leaving in the Fund only those assets attributable to contributions made on behalf of other participants. Under the likely expectations of the parties at the time of drafting section 13.3, the remaining assets would be nominal, and could be attributed directly to employer contributions made on behalf of those employees whose pensions had not yet vested as of a plant termination.

Thus, the existence of a large surplus, sufficient to fund vested benefits of a *defined benefit* plan several times over, was undoubtedly a situation not within the contemplation of the Pension Agreement as drafted. In such a

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[10] Spang also argues that Delgrosso may make no claim under section 13.3 until the Plan is actually terminated, citing *Van Orman v. American Insurance Company*, 680 F.2d 301 (3d Cir. 1982). By its terms, however, section 13.3 is triggered upon *plant* termination, an event which has already occurred.

situation characterized by Professor Farnsworth as an "omitted case," that is, a contingency not contemplated by the contract, a court may look to the expectations of the parties in order to interpret the agreement to deal with the unanticipated event. See E. Farnsworth, *Contracts* § 7.15-.16 (1982). According to Professor Farnsworth:

> In interpreting the agreement, the court will also consider the foreseeability of the situation. If the court is convinced that the parties could not have foreseen it, and therefore could not have intended their agreement to cover it, the court may refuse to apply the contract language, despite its apparent applicability, and may find that the case before it is an omitted one. This result is particularly likely under long-term contracts, where unforeseeability is endemic.

Id. at 522.

On the record before us, the only evidence of the parties' expectations in 1970 is a letter Forsling wrote to Newell, proposing a clause that would grant non-vested employees deferred pro-rated pensions upon plant termination. Forsling testified at deposition that this language reflected his understanding that the Pension Agreement would provide for deferred pro-rated pensions to non-vested participants in the case of plant shutdown. William T. Marsh, Vice President of Spang, stated by affidavit that section 13.3 was the result of the Union's desire for earlier vesting, to which the company responded by proposing immediate vesting upon plant termination. According to Marsh:

> At no time during the negotiation of any of the pension agreements recited above, i.e., from 1963 through 1980, did the Union ever propose that the pension benefits of low seniority employees be better than the pension benefits of higher seniority employees.

Affidavit of William T. Marsh dated October 10, 1983 at p. 7.

Delgrosso submitted no affidavit or evidence that would contradict the understanding of the Pension Agreement reflected by March's affidavit and Forsling's testimony, to the effect that non-vested participants were to receive no greater benefits than vested participants, with greater seniority. We thus conclude that the distribution scheme envisaged by section 12.2 of Spang's Plan (See Part IB *supra*) more nearly reflects the expectations of the parties when section 13.3 was originally drafted, than does the interpretation of section 13.3 advocated by Delgrosso.[11]

IV.

Having concluded that Spang breached its fiduciary duty by implementing a Plan provision providing for reversion of Fund assets to itself in violation of the Pension Agreement, we must determine what relief appropriately may be granted to Delgrosso under ERISA and the LMRA. In this connection, we note that plaintiffs' complaint sought, inter alia, reformation of the Plan document and appointment of an independent administrator.

Section 1109(A) of ERISA provides specifically that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter . . . shall be subject to such other equitable or

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[11] Apparently, Delgrosso contemplated a division of the surplus among vested and non-vested participants in the event that Spang was denied the surplus. In its brief, Delgrosso stated:

> Appellants believe that an administrator with no financial interest in the fund would, upon the Court's reformation of the Company's plan, distribute the excess assets in the fund equitably to Appellants and/or other participants.

Brief for Delgrosso at 42 n. 25.

remedial relief as the court may deem appropriate, including removal of such fiduciary.

Section 1132(a) further provides that:

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

A federal court enforcing fiduciary obligations under ERISA is thus given broad equitable powers to implement its remedial decrees. Removal and replacement of a fund administrator under ERISA has been found appropriate where the administrator has been in substantial violation of his fiduciary duties. *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied* ____ U.S. ____, 105 U.S. 565 (1984). Similarly, reformation of a labor document to reflect accurately the intent of the negotiating parties has been held to be an appropriate remedy under section 301(a) of the LMRA, 29 U.S.C. § 185(a). *West Coast Telephone Co. v. Local Union No. 77, I.B.E.W.*, 431 F.2d 1219 (9th Cir. 1970). See also *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1239 (3d Cir. 1980).

Since there is not the slightest ambiguity in the anti-reversion clause of the Pension Agreement, it is clear that reformation of the Spang Plan to bar reversion is appropriate. It is also evident from our discussion above that Spang

committed a substantial breach of its fiduciary duty to the Fund participants by fashioning a Plan which, contrary to the express terms of the Pension Agreement agreed to by the parties, would result in a reversion of the Fund assets to Spang rather than to the participants in the Fund for whose "exclusive benefit" the Fund must be managed. Since the Fund must now determine how to dispose of these excess assets, it is essential that an independent administrator be appointed to determine whether to terminate the Plan,[12] and to allocate the surplus assets among the appropriate participants. In light of the position taken by Spang in these proceedings, it is clear that Spang may not be charged with that task.

We note that ERISA specifically provides that the administrator perform the allocation of Fund assets upon termination. 29 U.S.C. § 1344(a). We also observe that Labor Regulations provide specifically for the allocation to be performed upon termination of a plan that does not allow reversion of plan assets to the employer, as this one does not. These regulations provide for allocation according to the ratio of each participant's accrued benefits to the sum of all accrued benefits. 29 C.F.R. § 2628.32(a).

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[12] Spang contends in a supplemental letter brief that an independent administrator may not decide to terminate the plan, relying on a provision in the Spang Plan (section 12.1) to the effect that "The Company shall have the sole and absolute right to terminate the Plan." We note, however, that ERISA authorizes the plan administrator to terminate a plan. 29 U.S.C. § 1341(a); see Employment Coordinator (RIA) ¶B-21, 120 (1985). An independent administrator thus need not follow an inconsistent plan provision to the contrary. 29 U.S.,C. § 1104(a)(1)(D). Nor does the administrator's authority to terminate unduly hamper the employer's freedom to decide whether or not to maintain a plan; nothing prevents the employer from terminating the plan if it desires to cease maintaining a plan or from creating a new plan if it desires to maintain a plan. In the circumstances of this case, where all plant locations covered by the plan have been closed, Spang's contention that it might wish to continue to maintain the plan is disingenuous.

Since this allocation would result in an increase in benefits payable to the vested, as well as the non-vested employees, the district court should appoint a representative for the vested participants to represent their interests in the selection of an independent administrator.

V.

We will affirm the entry of summary judgment on counts I and II in favor of Spang because these counts essentially sought to have all surplus assets distributed to the non-vested participants such as Delgrosso. We have held in this opinion that the surplus assets may not revert to Spang nor are they available exclusively to Delgrosso. Thus the district court's rejection of these counts of Delgrosso's complaint is well taken.

Because we find that Spang could not implement a Plan which allows reversion of Fund assets to itself, and because we find that by doing so Spang breached its fiduciary duty under ERISA, we will reverse so much of the district court's order of August 29, 1984 as granted judgment to Spang on Counts III and IV and we will remand this case with the following directions. The district court, consistent with the foregoing opinion, is directed to: 1) grant summary judgment in favor of Delgrosso on Counts III and IV[13] 2) reform the Spang Plan to provide that reversion to Spang of the Fund surplus is barred;

[13] Count IV stated a cause of action under the Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a).The district court entered judgment in favor of Spang based on Delgrosso's failure to exhaust contractual remedies, i.e., to arbitrate his claim. Since we have held that these claims were not within the arbitration clause of the Pension Agreement, see Part II, supra, summary judgment must be reversed. Delgrosso seeks no different relief under Count IV than he does under Count III, however, and having resolved in favor of Delgrosso the ERISA claims for reformation and appointment of an administrator, no other relief is available under Count IV.

3) appoint a representative for the vested participants to represent them in the selection of an independent Plan administrator; and 4) under appropriate procedures, appoint an independent administrator of the Plan in the place of Spang.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84–3618

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Appellants

v.

SPANG AND COMPANY *Appellee*

No. 84–3644

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Cross-Appellees

v.

SPANG AND COMPANY *Cross-Appellant*

On Appeal from the United States District Court for the Western District of Pennsylvania

(D.C. No.82-2672)

Argued June 12, 1984

BEFORE: WEIS, GARTH, and STAPLETON,
Circuit Judges

ORDER AMENDING OPINION

IT IS ORDERED that the opinion in the above-captioned matter, filed July 30, 1985, is hereby amended as follows:

1. Page 2, change "Argued June 12, 1984" to "Argued June 12, 1985";

2. Page 13, line 9, change "Subject to sections 1103(c) and (d).1342," to "Subject to section 1103(c) and (d), 1342,";

3. Page 23, fifth line from bottom, change "counts" to "Counts".

By the Court,

/s/ LEONARD I. GARTH

Circuit Judge

Dated: August 14, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3618

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

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(D.C. No. 82-2672)

Argued June 12, 1984
BEFORE: WEIS, GARTH, and STAPLETON,
Circuit Judges

ORDER AMENDING OPINION

IT IS ORDERED,

That the Court's opinion in this matter which was filed on July 30, 1985 be amended as follows:

On page 6 of the slip opinion the following three sentences are deleted:

> "Third, Spang closed its Lorain, Ohio plant and purchased full benefit annuity contracts for all vested participants, as well as pro-rata deferred annuity contracts for the plaintiffs, the non-vested participants. A surplus of over $100,000 remained in the fund after fully funding these annuities. It is this surplus which has given rise to this action."

Two sentences are to be substituted in their place:

> "Third, Spang closed its Lorain, Ohio plant, and after provision for payment of the pensions, a surplus of over $100,000 remained in the Fund. It is this surplus which has given rise to this action."

By the Court,

s/s LEONARD I. GARTH

Circuit Judge

DATED: OCTOBER 31, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action No. 82-2672

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs are former employees of the Ferroslag Division of defendant Spang and Company's plant which was located in Lorain, Ohio. Defendant closed the Lorain plant on July 20, 1982, and plaintiffs' employment terminated at that time. Through this action, brought pursuant to the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1001, *et. seq.*, and the Labor-Management Relations Act (hereinafter referred to as "LMRA"), 29 U.S.C. §141, *et. seq.*,[1] plaintiffs seek certain pension benefits allegedly due them as a result of the plant closing.

[1] Plaintiffs alleged that defendant is an employer engaged in interstate commerce, thereby making it subject to the requirements of both acts. Amended Complaint ¶2 (docket entry No. 5)

The pertinent operative facts are as follows. The defendant and the United Steelworkers of America, which represented plaintiffs during their employment for defendant, entered into a collective bargaining agreement that was effective from August 1, 1980 through November 1, 1983. The agreement provided that "[t]he Pension Plan Agreement, effective November 1, 1977, shall continue in effect until November 1, 1983 and as amended per the Memorandum of Agreement dated August 1, 1980." Complaint, Exhibit A, p. 33 (docket entry No. 1). The pension plan agreement (hereinafter referred to as the "agreement") addressed the issues of reversion of contributions to the defendant and distribution of assets upon plant shutdown in the following manner:

> 12.6. The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.
>
> * * *
>
> 13. In the event a plant is permanently shut down or a plant is relocated outside the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

Complaint, Exhibit B, pp. 27-28 (docket entry No. 1).

One other document is also involved here. To comply with the dictates of ERISA, the defendant drafted a pension plan[2](hereinafter referred to as the "plan"), which provided, in pertinent part, as follows:

> It . . . became necessary, in order to comply with ERISA, to establish a separate legal entity, the Pension Plan. During the period of time that there is in effect a collective bargaining agreement which specifically deals with pensions as to those employees that the Union represents . . . the said Pension Plan shall be construed in a manner consistent with those provisions as are provided for in any such collective bargaining agreement or any pension agreement addendum thereto during their term. The terms of such agreements shall not be deemed to establish a pension benefit or rights outside of this Pension Plan. . . .

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[2] *See* 29 U.S.C. § 1102, which requires a written plan.

Complaint, Exhibit D, pp. ii-iii (docket entry No. 1). The plan also addressed the distribution of assets in the event of plant shutdown, and its provisions on this subject are virtually identical to those contained in the agreement with the exception of the provision governing distribution to the remaining participants (12.2[4]), which provides as follows:

> [4] The remaining assets, *if insufficient to provide for all remaining accrued benefits,* will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph [4].

Complaint, Exhibit D, p. 53 (docket entry No. 1) (emphasis added). The plan further addressed the issue of reversion of assets to the employer, as follows:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Complaint, Exhibit D, p. 59 (docket entry No. 1).

On the basis of these facts, plaintiffs, who did not qualify for vested benefits at the time of plant shutdown, assert violations of ERISA and the LMRA. Specifically, plaintiffs' complaint asserts four counts as follows: (1) in Count I, plaintiffs assert that, upon plant closing, over $100,000 remained in the pension fund beyond the sum needed to cover vested benefits and that defendant has not allocated all excess benefits to the plaintiffs as required by 13.3 of the agreement, thereby breaching its fiduciary

obligation[3] under ERISA; (2) in Count II, plaintiffs assert that defendant intends to retain the surplus in the fund upon expiration of the agreement, thereby violating its ERISA fiduciary obligation to discharge its duties solely in the interest of the participants and beneficiaries; (3) in Count III, plaintiffs assert that defendant's conduct in drafting a plan that was inconsistent with the agreement violates ERISA's fiduciary mandates; and (4) in Count IV, plaintiffs assert that, by drafting the plan in a manner inconsistent with the collective bargaining agreement and the agreement, defendant has violated its contractual obligations under the LMRA. In sum, plaintiffs argue that the agreement controls in this case and that, since the agreement provides for distribution to the remaining participants, they are entitled to the entire surplus, in the form of annuity benefits,[4] in accordance with 13.3 of the agreement.

Defendant counters plaintiffs' assertions by arguing that the proper interpretation of the agreement and plan is that plaintiffs are entitled to that share of the surplus sufficient to provide a deferred vested pension benefit based upon their actual length of service, rather than to the entire surplus. Moreover, defendant contends that the provisions of the plan clearly embody the true intentions of the parties and that it was never intended that plaintiffs should receive a windfall such as they claim here.

The Court held a pretrial conference in this case, and at that conference, the parties informed the Court that the

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[3] Paragraph 2 of plaintiffs' complaint asserts that defendant is a "fiduciary" with respect to the agreement (docket entry No. 5), and defendant does not contest this position.

[4] At the pretrial conference in this case, plaintiffs informed the Court and the defendant that they are not seeking a lump-sum payment here, but rather request that the surplus be used to purchase annuities to be paid to the plaintiffs at the time that each reaches the age of 65.

case, or at least a large portion of it, could be decided on cross motions for summary judgment. Thus, the Court ordered that appropriate motions and briefs be filed and refrained from placing this case on its trial list pending resolution of the cross motions. Both parties filed motions and briefs, but both sides raised only the ERISA claims (Counts I-III) in their briefs and did not raise the LMRA claim (Count IV).[5] Accordingly, the Court treats the motions as ones for partial summary judgment and does not rule on the LMRA claim. As to the ERISA claims, the Court hereby grants defendant's motion for partial summary judgment and denies plaintiffs' motion.

Before addressing the merits of the motions, the Court deems it appropriate to review the law governing a court's review of a motion of summary judgment. Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Third Circuit has succinctly stated that summary judgment is warranted only upon a clear showing that no genuine issue of fact exists and that the law clearly favors summary judgment based on those facts. *Ely v. Halls Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978). All inferences, doubts, and issues of credibility must be resolved in favor of the non-moving party. *Id.* These statements guide the Court in its review of the motions here.

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[5] At page 42 of its brief, defendant argues that plaintiffs make no reference to the LMRA claim in either their motion or brief and, therefore, have presumably dropped it. On this basis, defendant contends that it is entitled to summary judgment on that claim. The Court rejects this argument because defendant bears the burden on its summary judgment motion, and since it has provided no authority for dismissal of this claim, it is not entitled to summary judgment.

The Court first addresses defendant's contention that plaintiffs' claims are barred by this Court's opinion of September 29, 1983, regarding defendant's motion to dismiss. It is appropriate to address this contention first because, although the Court rejects this contention, a discussion of the same will provide necessary groundwork for the Court's reasoning on defendant's successful contentions. In its motion to dismiss, defendant argued, on the basis of *Adams v. Gould*, 687 F.2d 27 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1777 (1983), that the case must be dismissed because this Court did not have jurisdiction due to plaintiffs' failure to exhaust the grievance and arbitration procedures provided for in the applicable agreements. On the basis of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Grander-Denver Co.*, 415 U.S. 36 (1973); and *Airline Pilots Association International v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980), the Court held that it did have jurisdiction and that plaintiffs did not have to exhaust the grievance and arbitration procedures because plaintiffs' claims arise out of, and assert violations of, federal statutory mandates. Defendant now asserts that because the Court is confronted with a motion for summary judgment rather than a motion to dismiss, the Court need not construe the pleadings most favorably to the plaintiffs. Instead, the defendant argues that the Court may pierce the allegations of the pleadings (6 Moore's Federal Practice ¶56.04[1], p 56-64), and, according to the defendant, if the Court pierces the pleadings in this case, it will find that plaintiffs' claims are purely contractual ones that require arbitration. The Court rejects this argument and adheres to its holding and reasoning on this issue in its opinion and order on the motion to dismiss. However, as it did in its opinion on the motion to dismiss, the Court emphasizes that it will restrict plaintiffs to proving federal statutory violations and will not permit them to prevail on a mere breach of contract argument. *DelGrosso, et. al. v. Spang and Company*, C.A. 82-2672, p. 8 (W.D. Pa. opinion and order of 9/29/83).

The Court now turns its attention to the contentions of both parties on the merits of plaintiffs' ERISA claims. In Count I, plaintiffs contend that by refusing to comply with 13.3 of the agreement and to allocate all excess benefits to plaintiffs, defendant breached its fiduciary duty under ERISA. Specifically, plaintiffs claim a breach of 29 U.S.C. §1104(a)(1)(D), which provides as follows:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> * * *
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

According to the plaintiffs, the defendant, by failing to apply the surplus to the benefit of plaintiffs, has failed to discharge its fiduciary duty of acting in accordance with the agreement governing the plan. Defendant opposes plaintiffs' position, arguing that 13.3 does not require that the entire surplus be earmarked for plaintiffs, rather, according to defendant, 13.3 requires only that defendant provide pension benefits for plaintiffs in accordance with the years of service that each plaintiff accrued. Defendant contends that since 13.3 must be interpreted in this fashion and since it (defendant) is prepared to provide a deferred vested pension to each plaintiff in accordance with his years of actual service, it has not violated its fiduciary duty of discharging its duties in accordance with the agreement. The Court agrees with defendant.

The language of 13.3 did not enlighten the Court as to which party was correct; thus, it looked to the history behind 13.3(d) and read the agreement as a whole. *See In re C. D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1132

(E.D. Pa. 1977), *aff'd. without opinion*, 582 F.2d 1273 (3d Cir. 1978). Paragraph 13.3 of the agreement was the result of labor negotiations between defendant and the union representing the plaintiffs and other employees. By letter of July 2, 1969, a representative of the union drafted a letter to an assistant vice-president of defendant, requesting, inter alia, that defendant consider an addition to the agreement which would provide for pension benefits for employees who would be terminated, for any reason, after ten-years' service. Marsh affidavit, Exhibit 3, p. 1 (docket entry No. 56). Counsel representing defendant met with the union representative and prepared a memo, to defendant's director of industrial relations, concerning this meeting. This memo stated that the real issue of concern in the request for pension benefits after ten-years' service was the need for a form of vesting in the event of a permanent facility shutdown and proceeded to recommend, to the director of industrial relations, that the defendant offer a form of vesting based on the years of service involved as a response to this concern. Marsh affidavit, Exhibit 5, pp. 2-3 (docket entry No. 56). In turn, by letter of February 5, 1970, defendant proposed a provision, with regard to plant shutdown, that contained essentially the same language as 13.3. Marsh affidavit, Exhibit 4, p. 2 (docket entry No. 56). This history coupled with the elaborate scheme for distribution upon plant shutdown that provides for distribution to the remaining participants only after all other liabilities have been satisfied (Complaint, Exhibit B, pp. 27-28 (docket entry No. 1)), with the fact that distribution of the entire surplus to plaintiffs would permit plaintiffs to receive extraordinarily large monthly benefits when compared with those who had many more years of service and were vested under the other terms of the agreement (Rackley affidavit and Exhibits A-D attached thereto (docket entry No. 58)), and with a reading of the agreement as a whole leads the Court to the conclusion that the parties intended to provide benefits for the remaining, unvested participants on a prorata

basis, with each participant's benefits limited to his years of actual service, and did not contemplate such an excess due to overfunding. Thus, the Court finds that defendant's interpretation of 13.3 is correct. Accordingly, the Court finds that defendant does act in accordance with the agreement by providing deferred vested pension benefits to plaintiffs based on their years of actual service, rather than on the basis of the amount of the surplus, and, therefore, does not violate its fiduciary obligation under 29 U.S.C. §1104(a)(1)(D).

Plaintiffs' second claim is that by holding the surplus in the fund until the collective bargaining agreement and agreement expire, thereby hoping to retain it for its own benefit, defendant violates its fiduciary obligation under 29 U.S.C. §1104(a)(1)(A)(i), which provides as follows:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries;. . . .

In sum, plaintiffs claim that, as a matter of law, defendant's retention of the surplus would violate this section, and, needless to say, defendant's argue against plaintiffs' position.

The Court finds no merit in plaintiffs' claim. As a basis for this decision, the Court looks to several different sources. First, the Court turns to the ERISA statutory provisions, specifically to 29 U.S.C. §1344(d)(1) which provides as follows:

> (d)(1) Any residual assets of a plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

All three requirements are present here in that all liabilities have been met,[6] the distribution is not alleged to contravene any provision of law,[7] and the plan provides for distribution to defendant.[8] *See* complaint, Exhibit D, p. 59 (docket entry No. 1). Thus, ERISA, itself, permits reversion to the defendant. It must be noted that §1104 provides that it is subject to §1134; therefore, the fulfillment of the requirements under §1344 creates an exception to §1104 here.[9]

Moreover, in enacting ERISA, Congress intended to federalize the common law of trusts. *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979). *See* 93d Cong., 2d. Sess., U.S. Code Cong. & Ad. News, pp. 4639, 5186 (remarks of Senator Harrison Williams).[10] The common law of trusts permitted the employer to recapture surplus assets. *See Pollock v. Castrovinci*, 476 F. Supp. 606,

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[6] Of course, this discussion incorporates the discussion of the previous section and assumes that defendant is providing benefits to the plaintiffs on the basis of their actual years of service, thereby satisfying that liability.

[7] The Court acknowledges that plaintiffs assert that the distribution contravenes 29 U.S.C. §1104(d)(1)(A)(i), but the Court rejects that argument here.

[8] It may be argued that the plan does not properly provide for reversion because it is inconsistent with the agreement, but as will be discussed *infra*, that argument lacks merit.

[9] The Court once again emphasizes that plaintiffs have invoked this Courts' jurisdiction on the basis of a violation of a federal statutory mandate, and the Court holds plaintiffs to proving such a violation and will not permit them to prevail on some other theory.

[10] Senator Williams stated that the objective of ERISA's fiduciary provision is "to make applicable the law of trusts."

612 (S.D.N.Y. 1979), *aff'd. without opinion*, 622 F.2d 575 (2d Cir. 1980) (prior to ERISA there was no problem in recapturing surplus assets).

Finally, the policies underlying the enactment of ERISA support an employer's claim to a surplus. As the *Moyer* Court stated,

> Employers will continue to fund their plan under ERISA guidelines, but will not be penalized for overfunding "in an abundance of caution" or as a result of a miscalculation on the part of the actuary. Thus, employees will continue to be protected to the extent of their specific benefits but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

441 F. Supp. at 1132-33. On the basis of these statutory provisions and case precedents,[11] the Court finds no breach of §1104(a)(1)(A)(i) by defendant's retention of the surplus.

Plaintiffs' third and final ERISA claim is that defendant included certain provisions in the plan that were inconsistent with the agreement, thereby violating its fiduciary obligation under §1104. Specifically, plaintiffs assert, on the basis of 12.6 and 13.3(d) of the agreement, that the agreement requires proration of all surplus funds for the benefit of the participants in the event of plant shutdown; however, the plan, at 12.2[4], provides for proration of remaining fund assets only if the funds are insufficient to provide for all accrued benefits. Plaintiffs further assert

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[11] One additional reason that provides indirect support is the provisions of the Internal Revenue Code and supplementing regulations, 26 U.S.C. §401(a)(2) and 26 C.F.R. §1.401-2(b), that permit an employer to recover residual assets, which result from actuarial error, without sacrificing favorable tax treatment. *See Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.C. 1983).

that 12.6 of the agreement prohibits reversion of the surplus fund; whereas, 12.3 of the plan provides for reversion of surplus assets to the defendant.[12] Although plaintiffs do not cite that specific portion of §1104 that is allegedly violated, it is apparent that they rely upon §1104(a)(1)(D) that requires a fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA. Defendant opposes plaintiffs' claims by asserting that the plan is consistent with the agreement and, more importantly, with ERISA.

Plaintiffs' first contention—that the plan is inconsistent with the agreement because it provides for proration of remaining fund assets only if the funds are insufficient to provide for all accrued benefits—can be disposed of on the basis of this Court's discussion of plaintiff's first ERISA claim. As the Court determined in that discussion, the true purpose and intention behind 13.3 of the agreement was to provide for those employees who were vested at the time of plant shutdown and then, after those liabilities were satisfied, to provide for pension benefits to the remaining participants in accordance with their actual years of service on a prorata basis of the funds available. Paragraph

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[12] This third count also asserts other claims that do not directly bear upon the distribution of assets; that is, plaintiffs claim that a collectively bargained insurance agreement (*see* complaint, Exhibit C (docket entry No. 1)) obligates the defendant to pay for retirees' medical benefits, yet the plan includes a provision that provides for retiree medical benefits to be paid from the pension fund and that the defendant set up an intermediary to administer the plan, yet the agreement charges the defendant with responsibility for administering the plan. Amended complaint p. 11 (docket entry No. 5). However, plaintiffs do not raise these issues in their brief; they merely raise the issues dealing with their right to the surplus, which the Court perceives to be the heart and essence of all three of the ERISA counts. Accordingly, the Court will proceed to decide the cross motions on Count III on the basis of those matters raised in the motions and briefs.

12.2[4] of the plan is in keeping with that purpose and intention and is, therefore, not inconsistent with the agreement.

The real heart of plaintiffs' third ERISA claim is found in its contention that the plan is inconsistent with the agreement to the extent that it provides for reversion of surplus assets to the defendant. In opposition to plaintiffs' contention, defendant cites the Court to the cases of *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128(E.D. Pa. 1977), aff'd. without opinion, 582 F.2d 1273 (3d Cir. 1978) and *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Company*, 555 F. Supp. 257(D.C. 1983). The Court finds those cases to be on point and persuasive and grants summary judgment in favor of defendant on this third count on the basis of said cases.

Moyer was also a suit by employees to recover surplus plan assets. The original plan in *Moyer* allowed the employer to alter, amend, or revoke the pension agreement. However, the employer's ability to alter, amend, or revoke was limited by a provision that prohibited alteration, amendment, or revocation for the purpose of permitting the trust corpus or income to revert to the employer. Shortly before the plan terminated, the employer amended the plan to provide for reversion to it of surplus due to actuarial computation. The Court upheld the validity of the amendment and permitted reversion to the employer, emphasizing that §1344(d)(1)[13] explicitly permits such reversion. Specifically, the *Moyer* Court noted that it was necessary to insure payment of the plan's obligations to the participants, but after those obligations were met, the employer was entitled to the surplus. As to the challenged amendment to the plan, the Court upheld its validity, stating that it "include[d] the language necessary to reserve the employer's right to the remaining assets

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[13] *See* discussion of this section in text *supra*.

as required . . ." under §1344(d)(1)(C). 441 F. Supp. at 1132.

In *Washington Star*, two documents—a pension plan and a trust agreement—governed the pension fund, which contained a four million dollar surplus. The trust agreement was amended in 1976 to provide that the trust fund would be used for the exclusive benefit of the employees and that no part of the fund would be returned to the employer. In 1981, the employer announced that it would cease operations and simultaneously amended the trust agreement to provide for reversion of all surplus assets. The former employees and several local unions brought suit, charging that the unilateral amendment was a breach of fiduciary duty under ERISA.[14] The Court, relying on *Moyer* and §1344(d)(1), upheld the amendment. 555 F. Supp. at 262.

These two cases are very akin to the case at hand. Here, the agreement prohibited reversion of surplus assets to the defendant. In 1981, defendant drafted the plan to comply with ERISA and backdated the plan to 1976. Marsh deposition, pp. 8-9 (docket entry No. 50). The plan provided for reversion of surplus assets. Defendant ceased operation at its Lorain plant in 1982. The holdings in *Moyer* and *Washington Star* provided that such a reversionary provision enacted during the life of the plan is valid. Moreover, it must again be emphasized that the provision that plaintiffs rely upon as a basis for the third count (§1104) specifies, first, that it is subject to §1344 which permits reversion, and, second, that a fiduciary need only discharge his duties in accordance with the documents and instruments governing the plan to the extent that such documents and instruments are consistent with the provisions of ERISA. 29 U.S.C. §1104(a)(1)(D). Since ERISA specifically provides for reversion if the plan so requires, it

[14] Please note that the exact same claim is alleged by plaintiffs here.

appears logical for an employer to incorporate such a reversionary provision in the plan to comply with ERISA.[15]

Before terminating its discussion on this third count, the Court deems it appropriate to discuss and distinguish one case cited by the plaintiffs as a basis for precluding defendant from amending the plan. In *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513 (4th Cir. 1980), an employer sought a declaratory judgment to validate its proposed distribution, to itself, of excess funds in a terminated pension benefit plan. The pension agreement in *Audio Fidelity* provided that, upon plan termination, any excess assets would be distributed to the participants. The employer amended the plan to provide for reversion, but the amendment did not occur until after the plan was terminated. The Court held the amendment to be invalid, stating as follows:

> On the date of termination, Audio no longer was obligated to make contributions, and the participants no longer were entitled to accrue additional benefits. The rights of both parties became fixed, and substantive modifications to the plan altering these rights were precluded. . . . The scheme established by ERISA relies upon the provisions of each plan at the time of termination. It would defeat congressional intent and render. . *.1344(d)(1)* nugatory if retroactive amendments after termination could alter substantive rights of the pension plan.

[15] The defendant, citing *Local 1574, I.A.M. v. Gulf & Western Mfg. Co.*, 417 F. Supp. 191 (D. Maine 1976), argues that if the plan conflicts with the agreement, the agreement controls, but this argument again ignores the fact that plaintiffs have asserted breaches of ERISA's fiduciary duties and the crucial factor is whether defendant has complied with ERISA's requirements, which defendant has done in this case.

Id. at 517 (emphasis added).[16] As one court in this Circuit has stated, "the crucial factor. . . influencing the [*Audio Fidelity*] [C]ourt was that the challenged amendment occurred after the plan's termination." *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 96 F.R.D. 632, 646 (D.N.J.), *aff'd.*, 726 F.2d 956 (3rd Cir. 1983) (Third Circuit found district court's interpretation of *Audio Fidelity* to be reasonable at p. 966). The Court agrees with the *Walsh* Court's interpretation and, since the amendment in this case occurred during the life of the plan, the Court distinguishes *Audio Fidelity* on the same basis here.

In sum, plaintiffs have predicated their ERISA claims on defendant's alleged violations of ERISA's fiduciary standards contained in §1104; however, their proof on these claims has been more in the nature of breach of contract theories. The defendant has cited the Court to the appropriate material in the record, statutory provisions, and case authority to support its position that it has, indeed, complied with §1104 in all respects. Accordingly, the Court grants partial summary judgment in favor of defendant on Counts I through III.

An appropriate Order will be issued.

Date: June 1, 1984

/s/ ALAN N. BLOCH

United States District Judge

cc: Counsel of record.

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[16] This statement gives the impression that the Court would have upheld the amendment if made before plan termination.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RALZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, and HUBERT J. LEE,

Plaintiffs,

vs.

SPANG AND COMPANY,

Defendant.

Civil Action
No. 82-2672

ORDER

AND NOW, this 1st day of June, 1984, upon consideration of Plaintiffs' Motion for Summary Judgment filed in the above captioned matter on August 11, 1983, which this Court treats as a Motion for Partial Summary Judgment, IT IS HEREBY ORDERED that said Motion is DENIED.

AND, FURTHER, upon consideration of Defendant's Motion for Summary Judgment filed in the above captioned matter on October 11, 1983, which this Court treats as a Motion for Partial Summary Judgment, IT IS HEREBY ORDERED that said Motion is GRANTED and that Counts I, II, and III of plaintiffs' complaint are hereby dismissed.

/s/ ALAN N. BLOCH

United States District Judge

cc: Daniel P. McIntyre and Joy E. Klopp, Esquires
Five Gateway Center, Pittsburgh, PA 15222.

William T. Marsh, Esquire
P.O. Box 751, Butler, PA 16001.

Henry J. Wallace, Jr., and Robert F. Prorok, Esquires
747 Union Trust Building, Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, et al., *Plaintiffs*, vs. SPANG AND COMPANY, *Defendant*.	**Civil Action No. 82-2672**

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs are former employees of the Ferroslag Division of defendant Spang and Company's plant, which was located in Lorain, Ohio. Defendant closed the Lorain plant on July 20, 1982, and plaintiffs' employment terminated at that time. Plaintiffs initiated this action under the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1001, *et. seq.*, and the Labor-Management Relations Act (hereinafter referred to as "LMRA"), 29 U.S.C. §141, *et. seq.* By opinion and order of June 1, 1984, the Court granted summary judgment in favor of defendant of the ERISA claims (Counts I—III of the complaint). The parties now have filed cross motions for summary judgment on the only remaining count, the LMRA claim (Count IV).[1] For the reasons set forth below, the Court grants summary judgment in favor of defendant on the remaining claim.

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[1] At the pretrial conference, the parties informed the Court that the case could be decided o cross motions for summary judgment. Accordingly, the Court ordered that appropriate motions and briefs be filed. Both sides filed motions and briefs, but neither side moved for summary judgment on, or briefed, the LMRA claim. After the Court granted partial summary judgment on the ERISA claims, the Court contacted plaintiffs' counsel to ascertain if the LMRA claim had been withdrawn. Plaintiffs' counsel stated that it had not been withdrawn, and the Court ordered that the parties move for summary judgment on, and brief, said claim.

The pertinent operative facts are as follows. The defendant and the United Steelworkers of America, which represented plaintiffs during their employment for defendant, entered into a collective bargaining agreement that was effective from August 1, 1980 through November 1, 1983. That agreement provided that "[t]he Pension Plan Agreement [(hereinafter referred to as "the agreement")], effective November 1, 1977, shall continue in effect until November 1, 1983 and as amended per the Memorandum of Agreement dated August 1, 1980." Complaint, Exhibit A, p. 33 (docket entry No. 1). The agreement addressed the issues of reversion of contributions to the defendant and distribution of assets upon plant shutdown in the following manner:

> 12.6. The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement.
>
> * * *
>
> 13.3. In the event a plant is permanently shut down or a plant is relocated outside the Geographical Area of its present operations, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

Complaint, Exhibit B, pp. 27-28 (docket entry No. 1).

One other document is also involved here. To comply with the dictates of ERISA, the defendant drafted a pension plan[2] (hereinafter referred to as the "plan"), which provides, in pertinent part, as follows:

> It . . . became necessary, in order to comply with ERISA, to establish a separate legal entity, the Pension Plan. During the period of time that there is in effect a collective bargaining agreement which specifically deals with pensions as to those employees that the Union represents . . . the said Pension Plan shall be construed in a manner consistent with those provisions as are provided for in any such collective bargaining agreement or any pension agreement addendum shall not be deemed to establish a pension benefit or rights outside of this Pension Plan. . . .

Complaint, Exhibit D, pp. ii-iii (docket entry No. 1). The plan also addressed the distribution of assets in the event of plant shutdown, and its provisions on this subject are

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[2] *See* 29 U.S.C. §1102, which requires a written plan.

virtually identical to those contained in the agreement with the exception of the provision governing distribution to the remaining participants (12.2[4]). which provides as follows:

> [4] The remaining assets, if insufficient to provide for all remaining accrued benefits, will, if permitted by law, be prorated among the remaining Participants in relationship to each Participant's established seniority to the total seniority of all remaining Participants for whom allocation is to be made under this subparagraph [4].

Complaint, Exhibit D, p. 53 (docket entry No. 1). The plan further addresses the issue of reversion of assets to the employer, as follows:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.

Complaint, Exhibit D, p. 59 (docket entry No. 1).

Plaintiffs contend that the agreement controls here and that, since the agreement provides for distribution to the remaining participants, they are entitled to the entire surplus, in the form of annuity benefits,[3] in accordance with §13.3 of the agreement. To achieve this end, plaintiffs asserted three claims for breach of ERISA's fiduciary mandates, which, as stated, the Court dismissed. Plaintiff's LMRA claim asserts that, by drafting the plan in a manner

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[3] At the pretrial conference in this case, plaintiffs informed the Court and the defendant that they are not seeking a lump-sum payment; rather, they request that the surplus be used to purchase annuities to be paid to the plaintiffs at the time that each reaches the age of 65.

inconsistent with the collective bargaining agreement and the agreement, defendant has violated its contractual obligations under the LMRA. As mentioned above, the Court hereby dismisses this final claim.

Before addressing the merits of the cross motions, the Court deems it appropriate to set forth the law governing a court's review of a motion for summary judgment. Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions, on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Third Circuit has succinctly stated that summary judgment is warranted only upon a clear showing that no genuine issue of fact exists and that the law clearly favors summary judgment based on those facts. *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978). All inferences and disputes issues of material fact must be construed most favorably to the non-moving party. *Id.* This law guides the Court in its review of the cross motions.

A discussion of the merits of the cross motions must begin with the Court's opinion and order of September 29, 1983, concerning defendant's motion to dismiss, because part of the Court's discussion in that opinion serves as the foundation for the Court's decision here. Specifically, the Court recalls that defendant moved to dismiss the LMRA count on the ground that plaintiffs have failed to exhaust the agreed upon disputes procedure set forth in the agreements upon which they claim entitlement to relief. Rejecting defendant's contention, the Court stated as follows:

> As to the LMRA claim . . . . the Court also finds that this claim is not barred by plaintiffs' failure to exhaust the arbitration and grievance procedures. Defendant cites the Court to the United States Supreme Court decisions of *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554 (1976), *Republic Steel Co. v. Maddox*, 379 U.S.

> 650 (1965), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), claiming that these three cases require that plaintiffs must exhaust their contractual remedies before bringing an action in federal court under the LMRA. The Court...rejects defendant's argument because the three Supreme Court cases cited above all involved situations in which a party was asserting a contractual right arising out of a collective bargaining agreement, rather than a violation of a federal statutory mandate. Count IV asserts a violation of a specific statutory mandate and is, thus, controlled by the *Alexander* [*v. Gardner-Denver Co.*, 415 U.S. 36 (1973)] and *Barrentine* [*v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)] decisions . . . . Since plaintiffs' claim in Count IV is based on rights arising out of a statute, it is not subject to arbitration.

Delgrosso v. Spang and Co., 586 F. Supp. 177, 182 (W.D. Pa. 1983) (footnotes omitted). Accordingly, the Court denied the motion to dismiss. It is important to note, however, that in ruling on the motion to dismiss, the Court restricted its review to the face of the pleadings and construed the pleadings most favorably to the plaintiffs as the non-moving party. *See id.* at 181 n. 8. Moreover, the Court cautioned plaintiffs that, once the case proceeded beyond the motion to dismiss stage, they (plaintiffs) would be required to prove a violation of a federal statutory mandate and would not be permitted to prevail by a showing of a mere breach of contract. *Id.* at 1982.[4]

Now that the case has reached the summary judgment stage, the Court is permitted to look beyond the pleadings

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[4] In sum, plaintiffs have opted to come directly to federal court, bypassing the available grievance and arbitration procedure, by asserting, in their complaint, statutory violations. Thus, plaintiffs must prove violations of federal statutory mandates and will not be permitted "to have their cake and to eat it too" by alleging violations of statutory mandates and then proving something less.

in testing the claims in light of the applicable law. Here, plaintiffs' brief in support of their motion for summary judgment argues only breach of contract theories as a basis for awarding summary judgment in their favor and does not present any case law to establish that §301 of the LMRA has been violated here. Defendant, on the other hand, correctly points out that the record now reveals that plaintiffs' failure to exhaust the available contractual remedies requires dismissal of the LMRA claim. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Co., v. Maddox*, 379 U.S. 650 (1965); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Court proffers two additional grounds for dismissing the LMRA count. First, in its opinion of June 1, 1984 in this case, *Delgrosso v. Spang and Co.*, C.A. 82-2672 (W.D. Pa.) (summary judgment on ERISA claims) (docket entry No. 62), the Court found that the plan was consistent with the agreements reached by the defendant and the union. The Court still adheres to that position, which serves to "take the heart out of " plaintiffs' LMRA claim. Second, in order for plaintiffs to bring this type of action against their former employer, they must "prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). Because plaintiffs did not allege an absence of fair representation by the union[5] and did not show any attempt to use the grievance and arbitration procedure, the claim must be dismissed. *See Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 522 (3d Cir. 1973).

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[5] In fact, the union's legal staff represents plaintiffs in this case.

For the foregoing reasons, plaintiffs' LMRA claim is dismissed. An appropriate Order will be issued.

Date: 8/29/84

/s/ ALAN N. BLOCH

United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, et al., *Plaintiffs*, vs. SPANG AND COMPANY, *Defendant*.	Civil Action No. 82-2672

JUDGMENT ORDER

AND NOW, this 29th day of August, 1984, upon consideration of Defendant's Motion for Summary Judgment on Count IV of the Complaint filed in the above captioned matter on July 9, 1984, IT IS HEREBY ORDERED that said Motion is GRANTED.

AND, further, upon consideration of Plaintiffs' Motion for Summary Judgment on Count IV of the Complaint filed in the above captioned matter on July 9, 1984, IT IS HEREBY ORDERED that said Motion is DENIED.

IT IS FURTHER ORDERED that, all claims now having been disposed of, judgment be and hereby is entered in favor of Defendant and against Plaintiffs.

/s/ ALAN N. BLOCH
United States District Judge

cc: Daniel P. McIntyre and Joy E. Klopp, Esquires
Five Gateway Center, Pittsburgh, PA 15222.

William T. Marsh, Esquire
P.O. Box 751, Butler, PA 16001.

Henry J. Wallace, Jr., and Robert F. Prorok, Esquires
747 Union Trust Building, Pittsburgh, PA 15219.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3573

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

v.

SPANG AND COMPANY

Matthew A. Delgrosso, James P. Blair, Lester Ware, Jimmie Mines, Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Sr., Gilbert Weese, Larry K. Hill, Charles G. Church, Jr., John R. Alves, Barry K. Racz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, and Hubert J. Lee, as well as the unnamed plaintiff vested participants,

Appellants

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE,

Petitioners

v.

SPANG AND COMPANY,

Respondent

HONORABLE ALAN N. BLOCH,

Nominal Respondent

(D.C. Civ. No. 82-2672)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,*
SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA, COWEN, NYGAARD AND SEITZ°,
Circuit Judges

The petition for rehearing filed by appellee/respondent Spang and Company in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ ANTHONY J. SCIRICA

Circuit Judge

Dated: June 18, 1990

°As to panel rehearing only.

APPENDIX D

United Steelworkers of America
AFL-CIO-CLC
1500 COMMONWEALTH BUILDING
PITTSBURGH, PA 15222

Phone: 471-5254
CABLE ADDRESS: USWA

July 2, 1969

Mr. Harry Baugh
Assistant Vice President
Ferroslag Div. of Spang & Company
Butler, Pennsylvania 16001

Re: Spang & Company Pension Agreement

Dear Mr. Baugh:

* * *

[p.2] [T]here are several other matters pertaining to particular problems at the various plant locations that we would like discussed in connection with pensions in general. They are as follows:

1. Trust Fund. The Union proposes that we retain the present common trust arrangement; however, we want to set the fund up so that the contributions attributable to each plant shall be earmarked so that in the event of a plant termination the earmarked portion of the fund will be used to provide pension benefits to the shutdown plant.

* * *

[p.3] After you have had an opportunity to consider these requests, then we should meet at a mutually convenient time and place to finalize the agreement.

Sincerely yours,
/s/ CARMON B. NEWELL, JR.
Carmon B. Newell, Jr.
Insurance, Pension and
Unemployment Benefits Dept.

CBN: as

cc: Jack Seman, Representative
Joseph Pavlich, Representative
John Stapay, Representative
L. H. Thornton, Temporary Director
Joseph Kender, Director
Joseph Germano, Director

SPANG & COMPANY
BUTLER, PENNSYLVANIA 16001
TELEPHONE (412) 287-8781

February 5, 1970

Mr. Carmen B. Newell, Jr.
Insurance, Pension and
Unemployment Benefits Department
United Steelworkers of America
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

Dear Mr. Newell:

In reply to your letter of July 2, 1969, addressed to Mr. Harry Baugh, the Company has reviewed the proposal therein set forth and has the following comments:

* * *

[p.3] Concerning the second part of the letter dealing with records and administration, it is our proposal to keep the contributions applicable to each of the Plans separate and distinct so as to enable us to equitably segregate the large fund into its component parts. We do not feel, however, that separate fund records must be constantly maintained in order to adequately assure proper fund balances. Inasmuch as this is, in reality, one Trust providing for uniform benefits, the segregation will only be applicable in the event of one location's termination, at which time the fund can be divided from the records presently maintained.

* * *

Very truly yours,

SPANG & COMPANY

P. T. Forsling
Director of Industrial Relations

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, et al., Plaintiffs, vs. SPANG AND COMPANY, Defendant.	Civil Action No. 82-2672

PROCEEDINGS

Transcript of pretrial conference held on Friday, September 9, 1983, United States District Court, Pittsburgh, Pa., before Honorable Alan N. Bloch, District Judge.

APPEARANCES:

On behalf of the Plaintiff:
Joy E. Klopp, Esq.

On behalf of the Defendant:
Robert F. Prorok, Esq., and
William T. Marsh, Esq.
Union Trust Building
P.O. Box 2009
Pittsburgh, Pa. 15230

Raymond R. Bergstedt
Official Reporter

° ° °

[p.4] THE COURT: Well, you both agree there are no facts in dispute?

MS. KLOPP: I don't think there are, no, Your Honor.

MR. PROROK: Well, again the only reservation Defendant has, there are no facts in dispute on the merits as to liability.

MS. KLOPP: Right.

MR. PROROK: And I also believe there are no facts in dispute as to damages, because it will be Defendant's

position that nothing of record establishes the amount of damages, and therefore summary judgment will be appropriate on that basis, as well.

° ° °

[p.8] THE COURT: As I say, you would stipulate that the damages, if appropriate, would be determined on this basis. And you'd give us the basis of determining damages, if you say that they might change.

MS. KLOPP: Fine. I'll do that.

[p.9] MR. PROROK: We can try to work that out. I suspect we may have problems on stipulating what is the appropriate figure. I think we might be able to give you alternatives. If you would find a certain factor the damages would be, because I think it's a very intricate factual situation where the viewpoint on damages may vary.

° ° °

THE COURT: Well, you are both representing to the court that you both feel you have no problems stipulating as to the facts.

MS. KLOPP: Right.

THE COURT: So that it's not necessary for us to go through then this pretrial procedure, because we are not going to trial.

MR. PROROK: Again I just want to make clear, I'm reluctant to indicate that we can stipulate as to damages, because I just don't know Plaintiff's damage theory from the facts I have available to me at this [p.10] point in time.

° ° °

288-4210

October 11, 1983

HAND DELIVERY

The Honorable Alan N. Bloch
United States District Judge
United States District Court for the
Western District of Pennsylvania
U. S. Post Office and Courthouse
Pittsburgh, Pennsylvania 15219

Re: DelGrosso, et al. v. Spang & Company
Civil Action No. 82-2672

Dear Judge Bloch:

Enclosed are copies of the following in the above case:

1) Defendant's Motion for Summary Judgment;

2) Defendant's Brief in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment;

3) Affidavit of William T. Marsh;

4) Affidavit of C. R. Dorsch; and

5) Affidavit of Heidi Rackley.

The originals of the above have been filed with the Clerk this date.

The parties indicated to the Court at the pretrial conference that the above action could be disposed of on cross motions for summary judgment, with the possible exception of fixing the amount of damages if such a calculation proved necessary. With a view toward facilitating this Court's review of the cross motions for summary judgment, the parties engaged in several meetings for the purpose of agreeing upon a set of stipulated facts but were unable to reach agreement.

Notwithstanding the inability of the parties to agree upon a set of stipulated facts, Defendant believes that the Court will find all of the material facts for purposes of Defendant's cross motion for summary judgment to be undisputed and that Defendant is entitled to the entry of summary judgment as a matter of law. Defendant of course believes that the amount of damages is an issue which will not need to be addressed by the Court. Its positions on damages, however, are included in Defendant's Brief.

Sincerely,
REED SMITH SHAW & McCLAY

By
Robert F. Prorok

RFP: lm

Enclosures

cc: Joy E. Klopp, Esquire (w/encl)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHTER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE, and CHARLES E. VAN RIPER, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 82-2672

DEFENDANT'S BRIEF IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

* * *

[p.9 n.2] Much of the pension trust consists of funds and investment growth attributable to the Chicago facility which was closed in 1979. (Marsh Affidavit, ¶11). Under no conception of the case are Plaintiffs, former Lorain, Ohio employees, entitled to assets attributable to work performed by former Chicago employees.

* * *

[p.15] The heart of the parties' disagreement regarding the pension agreement centers around Section 13.3.

Plaintiffs contend that they are "remaining participants" for purposes of Section 13.3(d) and are entitled to all of the pension trust's remaining assets. Defendant, on the other hand, contends, *inter alia,* that Plaintiffs are not "remaining participants" in the sense intended by Section 13.3(d) and in any event, at most, are entitled only to any remaining assets which might exist that are attributable to the Lorain, Ohio facility.

° ° °

[p.33] Even if Plaintiffs are somehow deemed entitled by the Court to more than their accrued pension benefit, they are not entitled to all remaining funds in the pension trust.

As previously noted, a substantial portion of the current pension trust fund balance is attributable to the carryover of surplus from the Chicago closing. (Marsh Affidavit, ¶11). Section 13.3 of the pension agreement says that upon a plant closing "the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total contributions made on behalf of all locations." The amount of contributions made to the pension trust by Defendant as the result of hours worked by Chicago employees is approximately equal to the amount of contributions paid as the result of hours worked by Lorain [p.34] employees (Marsh Affidavit, ¶11).[4] Therefore, under a proper application of Section 13 of the pension agreement to Plaintiffs' theory of liability, Plaintiffs would be entitled at most to annuities purchased with approximately one-half of the pension trust assets.

° ° °

[4] No bargaining unit employee of Defendant's Ferroslag Division ever made any contribution to the pension trust. (Marsh Affidavit, ¶12).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHTER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE, and CHARLES E. VAN RIPER, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 82-2672

AFFIDAVIT OF WILLIAM T. MARSH

Robert F. Prorok

Reed Smith Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Defendant,
Spang & Company

Dated: October 11, 1983

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHTER, ROBERT HARDWICK, JEROME J. PHILLIPS, SR., GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE, and CHARLES E. VAN RIPER, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 82-2672

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA COUNTY OF ALLEGHENY	ss:

Before me, the undersigned authority, personally appeared William T. Marsh, who being duly sworn according to law deposes and says that he is Vice President, Secretary and General Counsel of Spang & Company, the above Defendant, that as such he has personal knowledge of the matters recited herein, and that the following is true and correct:

1. From 1961 to 1982 Defendant operated various slag processing plants under contract to United States Steel Corporation. The initial plant was located at South Works, Chicago, Illinois and was in operation from 1961 to November 1979; the second such plant was located at Lorain

Works, Lorain, Ohio, and was in operation from 1963 to 1982; the third such plant was located at the Homestead Works, Homestead, Pennsylvania, and was in operation from 1967 to June 1973. Defendant operated such plants under its Ferroslag Division.

2. All production and maintenance employees of Defendant's Ferroslag Division plants recited in paragraph 1 above were members of the United Steelworkers of America (the "Union"), which was the certified collective bargaining agent for such employees.

3. Plaintiffs in this action are nineteen of the fifty-one former employees of Defendant's Ferroslag Division plant at Lorain, Ohio. Exhibit 1 attached hereto is a 1982 seniority list of the Lorain Ferroslag employees.

4. Since 1963, Defendant and the Union have been parties to a series of collectively bargained agreements applicable to the Union employees of all of Defendant's Ferroslag Division plants. These consisted of successive basic agreements, pension agreements and insurance agreements.

5. On November 6, 1968, the Defendant's Ferroslag Division and the Union executed a Memorandum Agreement of 1968 Contract Settlement, a copy of which is attached hereto as Exhibit 2. Said Memorandum Agreement provided that the parties would negotiate an amended pension agreement similar to Basic Steel within the parameters of the agreed funding. Pursuant thereto, the Union and Defendant exchanged correspondence in which the Union expressed concern over the vesting of accrued pension benefits and over securing the payment of pension benefits in the event of a plant discontinuance, and Defendant responded to those concerns by offering to provide a vested benefit under the same terms and conditions as U.S. Steel and further to vest accrued benefits in case of a plant shutdown to the extent such benefits were funded. The Union accepted this offer, and the parties

then drafted and executed a revised Pension Agreement dated December 11, 1970. Copies of the letters exchanged and of a Memorandum by William P. Powderly III, Esquire, Defendant's independent pension counsel, in which he reviewed the matter for Defendant, are attached hereto as Exhibits 3, 4, and 5, and a copy of the December 11, 1970 Pension Agreement is attached hereto as Exhibit 6.

6. Section 10.3 of the December 11, 1970 Pension Agreement which embodied the agreement recited in paragraph 5 above, has been retained in essentially unchanged form over the years and appears as Section 13.3 of the current Pension Agreement dated November 1, 1980. Copies of the Pension Agreements of November 30, 1972; November 1, 1975; November 1, 1977; and November 1, 1980 are attached hereto as Exhibits 7, 8, 9, and 10 respectively.

7. At no time during the negotiation of any of the pension agreements recited above, i.e., from 1963 through 1980, did the Union ever propose that the pension benefits of low seniority employees be better than the pension benefits of higher seniority employees.

8. In June 1973, Defendant's Ferroslag Division plant at Homestead was discontinued.

9. In November 1979, Defendant's Ferroslag Division plant at the U.S. Steel South Works in Chicago, Illinois was discontinued. By agreement between Defendant and the Union, the accrued pension benefits of the Chicago Ferroslag employees were vested despite the fact that many of those employees had less than 10 years of continuous service. All employees separated from employment as a result of the discontinuance of the Chicago operations in November of 1979, except one employee who voluntarily elected to continue receiving disability workmen's compensation payments which exceed the amount of his accrued pension benefit, received a deferred vested pension benefit equal to their accrued benefit, based upon their

years of continuous service with Defendant, payable either in the form of an annuity or the lump sum actuarial equivalent in cash if the present value was less than $1,750. This was in accordance with the intention of the parties as described in paragraph 5 above. A copy of the written agreement described in this paragraph is attached hereto as Exhibit 11, and a copy of a supplemental letter agreement concerning the one employee referenced above is attached hereto as Exhibit 12. This vesting of pension benefits was handled in accordance with the plain meaning of the language of the November 1, 1977 Pension Agreement (Exhibit 9 hereto), namely all accrued pension benefits of participants were vested, and no participant received more than his accrued benefit.

10. When Defendant's Ferroslag Division plant at the U.S. Steel Lorain Works in Lorain, Ohio, was discontinued in July 1982, the vesting of accrued pension benefits for participants at that location was handled in exactly the same way, namely all accrued pension benefits of participants were vested and no participant received more than his accrued benefits. The accrued deferred vested benefit of each participant is recited in the Affidavit of C. R. Dorsch, the Pension Plan Administrator.

11. In order to secure payment of the pension benefits of the Ferroslag employees covered by the various pension agreements over the years, Defendant established and still maintains a pension trust with The Union National Bank of Pittsburgh as Trustee. Prior to February 1, 1975, Defendant contributed, in accordance with the applicable pension agreement between Defendant and the Union, a certain amount of cents per hour worked by its bargaining unit employees at the covered Ferroslag plants. Effective February 1, 1975, the cents per hour contribution was discontinued; in lieu thereof, the Company agreed to make contributions based on the recommendations of an independent actuary, but in no event less than the ERISA minimum funding standards. At no time since February 1,

1975 has a contribution to the pension trust been recommended by the independent actuary, nor has any contribution been required by the ERISA minimum funding standard. Accordingly, none has been made. As of August 1, 1982, the balance in the pension trust was approximately $1,253,511. The contributions by Defendant to the pension trust attributable to Chicago and Lorain, from the inception of the pension trust to the present, are as follows:

Chicago	$192,225.32
Lorain	189,114.09
Total	$381,339.41

As of August 1, 1982, the balance in the pension trust attributable to each location was approximately as follows:

Chicago	$ 532,002.00
Lorain	721,509.00
Total	$1,253,511.00

12. No bargaining unit employee of Defendant's Feroslag Division has ever made any contribution to the pension trust.

13. No portion of the pension trust has been returned to Defendant, nor has Defendant made any request or demand that any portion of the pension trust be returned to it.

14. Defendant has not terminated the November 1, 1980 pension agreement of which the Plaintiffs in this action are participants.

15. Attached hereto as Exhibit 13 is a true copy of the Pension Plan of Ferroslag Division of Spang & Company for Employees in the Bargaining Unit Represented by United Steelworkers of America, AFL-CIO-CLC, which has been approved by the Internal Revenue Service and which is currently in effect. The Defendant has not terminated this Plan.

/s/ WILLIAM T. MARSH

William T. Marsh

Sworn to and subscribed
before me this 10th
day of October, 1983.

/s/ PATRICIA H. HAMILTON

Notary Public

My Commission Expires: Nov. 29, 1983

PENSION PLAN AGREEMENT

Between

FERROSLAG, DIVISION OF SPANG & COMPANY
(South Works, Chicago, Illinois; Lorain, Ohio and Homestead, Pennsylvania)

and

UNITED STEELWORKERS OF AMERICA

-1970-

° ° °

[p.16] 10.3 In the event a plant is permanently shut down or a plant is relocated outside of the geographical area of its present operation, the assets of the fund [p.17] established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all employees at such location compared to the total contributions made on behalf of all locations.

° ° °

PENSION PLAN AGREEMENT

THIS AGREEMENT, dated the 30 day of November, 1972, is between the South Works plant, Chicago, Illinois, the Homestead, Pennsylvania plant and the Lorain, Ohio plant of the FERROSLAG DIVISION OF SPANG & COMPANY, hereinafter referred to as the "Company", and the UNITED STEELWORKERS OF AMERICA, hereinafter referred to as the "Union".

° ° °

[p.25] 11.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all employees at such location compared to the total Contributions made on behalf of all locations.

° ° °

11/10/78

PENSION AGREEMENT

between

FERROSLAG
DIVISION OF SPANG & COMPANY

AND

UNITED STEELWORKERS OF AMERICA

Effective Date
November 1, 1977

* * *

[p.27] 13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations.

* * *

PENSION PLAN AGREEMENT

between

FERROSLAG
DIVISION OF SPANG & COMPANY

AND

UNITED STEELWORKERS OF AMERICA

Effective Date
November 1, 1980

* * *

[p.27] 13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations.

* * *

4/29/80

THIS AGREEMENT entered into this 10th day of July, 1980, by and between SPANG & COMPANY, on behalf of its Ferroslag Division, South Works Plant, Chicago, Illinois (hereinafter referred to as "Division"), and the UNITED STEELWORKERS OF AMERICA (hereinafter referred to as "Union").

WITNESSETH:

WHEREAS, the Company has for many years operated certain facilities and conducted certain operations under contracts for the processing and disposal of slag from an area known as the South Works Plant, Chicago, Illinois ("Chicago"); and

WHEREAS, the Company has been unsuccessful in obtaining a new contract and has, as a result, been forced to terminate the employment of all persons employed at Chicago; and

WHEREAS, the Company and the Union have agreed that the Pension Plan established and maintained pursuant to the Pension Plan Agreement effective November 1, 1977, by and between the Company and the Union be amended and terminated as to Chicago; and

WHEREAS, under the provisions of Section 13.2 of the Pension Plan of the Ferroslag Division of Spang & Company for the United Steelworkers Employees (the "Plan"), the Company and the Union are required to meet and arrange for the proper funding and protection of the terminated employees' accrued pension rights and that such protection be consistent with the applicable provisions of the Employee Retirement Income Security Act of 1974.

[p.2] NOW, THEREFORE, the parties hereto, intending to be legally bound, covenant and agree as follows:

* * *

4. The Administrator of the Plan shall thereupon instruct the Trustee to purchase from the assets, from an insurance carrier approved by the Union and the Division, an annuity contract or contracts having a monthly benefit payment for each eligible Participant covered by this Agreement, commencing either immediately or deferred as provided by the Plan, in an amount which has been previously determined by the actuary to have been covered by the assets, but in no event shall such annuity provide an amount greater than the accrued benefit due an employee or former employee due to his participation in the Plan.

* * *

[p.3] 8. The annuities so purchased for employees who have not retired on or before November 30, 1979, and whose employment was terminated on November 30, 1979, shall be in the form of either an immediate or deferred single life annuity, whichever is applicable; provided, however, should the Participant be married at the time of the purchase of an immediate annuity, such single life annuity will be converted [p.4] into a joint and survivor annuity with the Participant's spouse as a 50% survivor annuitant unless the Participant, within the time established by the insurance carrier, elects in the manner established by the insurance carrier some other mode of actuarially equivalent form of annuity payments being offered by the insurance carrier. For the purposes of this paragraph, should the equivalent actuarial value be in an amount of $1,750 or less, the Administrator shall instruct the Trustee to pay such Participant, in a single sum, an amount equal to what the consideration would have been for such annuity.

* * *

[p.5] 12. Upon the purchase of the annuities or the payment of the lump sum as herein provided:

A. the Division, Spang & Company, the Union, the Trustee, the Plan Administrator, the officers, employees, agents, and director of each of the foregoing shall be forever released and discharged from any and all duties or liabilities arising by reason of the establishment and maintenance of the Plan, except as such Plan is continued for employees of the Division at its Lorain, Ohio facility. Should it be required that a Trustee be owner of any issued insurance contract, such ownership shall impose only the duty of safekeeping.

[p.6] B. the Plan shall be deemed to be amended by deleting all reference therein to the South Works Plant, Chicago, Illinois, and shall be deemed to be partially terminated as to employees and former employees covered by this Agreement.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW A. DelGROSSO et al., Plaintiffs vs. SPANG & COMPANY, Defendant	Civil Action No. 82-2672 Pittsburgh, Pennsylvania June 23, 1986

TRANSCRIPT OF STATUS CONFERENCE BEFORE HONORABLE ALAN N. BLOCH

APPEARANCES:

For Plaintiffs:	United Steelworkers of America BY: JOY E. KLOPP, ATTORNEY DANIEL P. McINTYRE, ATTORNEY Five Gateway Center Pittsburgh, Pennsylvania 15222
For Defendant:	Reed Smith Shaw & McClay BY: ROBERT F. PROROK, ATTORNEY HOLLIS T. HURD, ATTORNEY James H. Reed Building 435 Sixth Avenue Pittsburgh, Pennsylvania 15219 WILLIAM T. MARSH, ATTORNEY Spang & Company Post Office Box 751 Butler, Pennsylvania 16001
Official Reporter:	Marilyn G. Brown 1025 United States Court House Pittsburgh, Pennsylvania 15219

[p.2] (Proceedings began in the conference room at 10:30 AM on June 23, 1986.)

* * *

[T]he Court at this time grants summary judgment in favor of the plaintiffs on Counts 3 and 4.

* * *

[p.9] MR. McINTYRE: And the third point, Your Honor, is something that Spang is raising now which seems to depart from the specific mandate of the Court, which seems to be quite on point in saying that it is dealing with all the surplus in the plan. Spang is now raising a contention that it is only the [p.10] unlimited part of the process and that which it says is attributable to Lorain. I understand the Circuit. I just want to know the Court understands we were arguing the entire surplus of that plan.

MR. PROROK: Your Honor, the Third Circuit opinion says the fund was divided into two. This is a suit by only Lorain participants. I think fairly read, the opinion is clearly directed toward the disbursement of Lorain monies to Lorain participants.

Now what Steelworkers suggest,—and this is certainly a point of contention that has been raised long before today,—their contention would result in monies which were contributed by Spang for hours worked by Chicago employees to go to Lorain employees, and the Third Circuit didn't intend that.

THE COURT: They certainly didn't intend that. That wouldn't be to my understanding.

MR. McINTYRE: The Circuit spoke specifically of all the surplus in the plan. There's one plan, and the Circuit recognized there was one plan.

THE COURT: Are you taking the position that all the surplus from Chicago as well should be distributed to Spang employees here?

MR. McINTYRE: Those are the remaining participants, if it's in the plan.

MR. PROROK: The Third Circuit opinion clearly talks [p.11] about the division.

THE COURT: Well, it's clear none of the surplus can revert to Spang. Now it seems to me then we're dealing with an issue as to who is entitled to those surpluses. I

would not certainly think that these employees would be entitled to surplus created for Chicago employees. The Chicago employees might be entitled to that, and it might take some other suit to get that. We're going to see to it that the plan does not allow any reversion to Spang of any monies, so that there is nothing going to happen to that money, but I wouldn't see where these employees would be entitled to it.

MR. PROROK: Just so it's clear, our position would be that the portion of the fund which would have Chicago monies is not even in dispute in this lawsuit.

MR. McINTYRE: That's just my position. We're talking about the plan surplus, and that is the plan surplus.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Franklin DiFrancesco and Barry K. Racz, Plaintiffs, v. Spang & Company, Defendant.	COMPLAINT Civil Action No. 89-1680 Jury Trial Demanded

1. Franklin DiFrancesco is a former employee of the Spang & Company's Ferroslag Division and a participant in its Pension Plan for Bargaining Unit Employees of Ferroslag Division of Chicago and Lorain (hereinafter "the Plan"), Federal identification number 25 0809990 005.

2. Barry K. Racz is a former employee of the Spang & Company's Ferroslag Division and a participant in the Plan.

3. Defendant Spang & Company (hereinafter "Spang") is an employer which, in fulfillment of its obligations under successive collectively bargained pension agreements, sponsored the Plan. The most recent such agreement is appended to this Complaint as Exhibit A.

4. Pursuant to its collective bargaining agreement and pursuant to various Federal statutes and regulations governing pension plans, Spang maintained trusts to pay the pension benefits provided by the Plan. It funded the trusts by contributing the agreed upon number of cents per hour that its successive collective bargaining agreements required.

5. In 1983, for instance, the value of assets in the pension Fund equalled more than $1,300,000. The assets were held by the Union National Bank as trustee in a common trust along with the assets of a number of other plans sponsored by Spang.

6. On July 30, 1985, in a judgment arising out of a lawsuit concerning the ownership of the Plan's surplus assets, the Third Circuit Court of Appeals found that "Spang could not implement a Plan which allows reversion of Fund assets to itself and . . . that by doing so Spang breached its fiduciary duty under ERISA." The judgment ordered that "the surplus assets may not revert to Spang," and "that reversion to Spang of the Fund surplus is barred." *Delgrosso v. Spang and Co.*, 769 F.2d 928, 938-39, (3d Cir. 1985). A copy of the Third Circuit's judgment is appended to this Complaint as Exhibit B.

7. In 1987, Spang removed from the Fund a substantial portion of Fund assets and placed those assets into a different fund. Spang purported to establish this different fund for a theretofore non-existent plan and described it as being for the benefit of its former Chicago employees (hereinafter "the so-called Chicago plan").

8. In 1988, Spang terminated the so-called Chicago plan and converted approximately one million dollars of assets to its own use.

9. Spang's actions are in breach of its undertaking under its collective bargaining agreements in which it promised that its contributions "may not, under any circumstances, revert to the Company" and that if the plan terminated funds would be used as prescribed by the collectively bargained pension agreement. (Exhibit A hereto, p. 25). 29 U.S.C. §185(a) confers jurisdiction upon this Court to determine this claim, after a jury trial.

10. Spang's actions constitute a breach of the collectively bargained plan and a breach of the fiduciary duties imposed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 502 of ERISA, 29 U.S.C. §1132, confers jurisdiction upon the Court to determine this claim.

Jury Trial Demand

11. As essential elements of Plaintiffs' claims are legal in nature, Plaintiffs demand that their case be tried before a jury.

Prayer For Relief

WHEREFORE, Plaintiffs request the following relief after trial by jury:

(1) That the Court declare that Spang has violated the terms of the collectively bargained Plan by appropriating for its own use the surplus Plan assets;

(2) That the Court order Spang to perform its contractual obligations to the Plan participants;

(3) That the Court declare that Spang has violated its obligations under the Plan and under ERISA;

(4) That the Court order Spang to perform its obligations under the Plan and under ERISA;

(5) That the Court order an accounting, requiring Spang to disclose all details concerning its appropriation of Plan assets; and

(6) That the Court award the Plaintiffs their attorneys' fees, costs, and any other appropriate relief.

Respectfully submitted,

/s/ WILLIAM T. PAYNE

William T. Payne
Five Gateway Center
Pittsburgh, PA 15222

/s/ KATHRYN L. SIMPSON

Kathryn L. Simpson
Leo G. Daly
Grogan, Graffam McGinley &
Lucchino
Three Gateway Center, 22nd Floor
Pittsburgh, PA 15222
Counsel for Plaintiff
Barry K. Racz

and

/s/ JOHN J. KEARNS, III

John J. Kearns, III
Eckert, Seamans, Cherin & Mellott
42nd Floor, 600 Grant Street
Pittsburgh, PA 15219
Counsel for Plaintiff
Franklin DiFrancesco

Dated: August 14, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANKLIN DiFRANCESCO and BARRY K. RACZ, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 89-1680

PRETRIAL STATEMENT

Plaintiffs Franklin DiFrancesco and Barry K. Racz, by their counsel Kathryn L. Simpson and Grogan, Graffam, McGinley & Lucchino, P.C. and John J. Kearns, III, Esquire and Eckert, Seamans, Cherin & Mellott, submit the following Pretrial Statement:

* * *

[p.3] *Statement of Facts*

From its outset in 1982, the *Delgrosso* action centered on the single question of ownership of the Pension Plan's surplus assets. The Pension Plan governed a single fund into which Spang had made contractually mandated contributions for Spang's Chicago and Lorain plants.

* * *

[p.13] *III. WITNESS LIST*

All witnesses are liability witnesses unless otherwise noted.

* * *

5. Phillip Forsling
   Box 527
   West End, NC

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANKLIN DIFRANCESCO AND BARRY K. RACZ, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 89-1680

DEFENDANT'S PRETRIAL STATEMENT

Defendant Spang & Company, by and through its counsel, respectfully submits the following Pretrial Statement:

* * *

[p.20] *III. WITNESSES*

A. Spang intends to call witnesses in person or by the introduction of all or designated portions of testimony from deposition transcripts from the following list of witnesses. Unless indicated otherwise, all witnesses are intended to be witnesses as to liability.

* * *

Philip T. Forsling
Box 527
West End, NC 27376

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANKLIN DiFRANCESCO and BARRY K. RACZ, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 89-1680

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

° ° °

[p.7] In negotiating a final plant closing agreement for Chicago in 1980, Spang and the Union did *not* separate out the assets derived from contributions attributable to Chicago (as described in Section 13.3). Instead, the parties negotiated the Chicago Shutdown Agreement pursuant to Section *13.2*.

° ° °

[p.8] In the exchange of correspondence which culminated in the July 10, 1980 Chicago Shutdown Agreement, Spang's chief negotiator told the Union's negotiator that Spang still needed to "complete Form 5303 for the IRS to continue qualification of the [p.9] Plan for the Lorain location." 4/12/90 Payne Aff., Exh. C. Spang considered the submission to Internal Revenue Service necessary because, when a substantial number of active participants in a plan cease accruing service, a "partial termination" results.

° ° °

In characterizing the event which had taken place, Spang's sworn application did *not* state that any so-called "Chicago surplus" was being removed.

° ° °

[p.12] During the exchange of proposals during these 1980 negotiations, Spang never told Union negotiators that it already had the right to take the portion of the surplus attributable to the Chicago contributions. Union negotiators properly assumed that the Pension Fund was a single Fund, and that there had been no separation of "Chicago surplus."

* * *

[p.25] *The Chicago Shutdown Agreement Did Not Grant Any Surplus to Spang*

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANKLIN DiFRANCESCO and, BARRY K. RACZ, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 89-1680

AFFIDAVIT OF PHILIP T. FORSLING

STATE OF NORTH CAROLINA } SS:

Before me, the undersigned authority, personally appeared PHILIP T. FORSLING, who being duly sworn according to law, deposes and says that he is former Director of Industrial Relations of Spang & Company, the defendant herein, that as such he has personal knowledge of the matters recited herein, and that the following is true and correct:

1. Spang & Company ("Spang") is located in Butler, Pennsylvania. The business of Spang's Ferroslag Division used to be processing slag, which it did under contracts with U.S. Steel Corporation at plants located next to U.S. Steel plants. The exclusive collective bargaining representative of the employees at these Spang plants was the United Steelworkers of America (the "Union"), with whom Spang had a succession of collective bargaining agreements. Spang's Ferroslag Division had plants in Chicago, Illinois; Lorain, Ohio; and Homestead, Pennsylvania (the "plants"), all three of which were covered by the same collective bargaining agreements.

2. In 1969, the Union proposed to set the fund up so that the contributions attributable to each plant would be earmarked. A true and correct copy of a document evi-

dencing that proposal, identified as Defendant's Exhibit A4, is attached hereto.

3. Section 10.3 of the 1970 pension agreement applicable to the Chicago, Lorain and Homestead plants (the "1970 pension agreement") was drafted in response to the Union's 1969 proposal described in Paragraph 2. A true and correct copy of the 1970 pension agreement, identified as Defendant's Exhibit J1, is attached hereto.

4. Section 10.3 of the 1970 pension agreement was intended by Spang and the Union to be mandatory, and to apply automatically in the event of a plant closing, and so provides by its express terms.

5. Section 10.3 was intended by Spang and the Union to operate in tandem with section 10.2 in the event of a plant closing.

6. Section 10.2 was intended by Spang and the Union to be a mandatory provision, along with section 10.3, and so provides by its express terms.

7. Section 10.2 was never intended by Spang or the Union to operate independently from section 10.3 with respect to a plant closing.

8. Sections 10.2 and 10.3 of the 1970 pension agreement were retained in virtually unchanged form over the years in pension agreements applicable to the Chicago, Lorain and Homestead plants, appearing as sections 11.2 and 11.3 in the 1972 pension agreement applicable to those three plants, and as sections 13.2 and 13.3 in the 1977 pension agreement applicable to the Chicago and Lorain plants only. True and correct copies of the 1972 and 1977 pension agreements, identified as Defendant's Exhibits F1 and H1, are attached hereto.

9. Spang's Ferroslag Division plant in Homestead closed in 1973, when Spang lost its contract with U.S. Steel to process slag at Homestead. Upon the Homestead plant closing, sec~~tions~~ 11.2 and 11.3 of the 1972 pension agree-

ment applied automatically, as had been intended by Spang and the Union, limiting the Homestead participants to the Homestead pension fund. That amount was determined to be $165,246.01. A true and correct copy of a document evidencing the the amount of the Homestead pension fund upon that plant's closing, identified as Defendant's Exhibit Z3, is attached hereto.

10. Upon the Homestead closing, Spang and the Union met pursuant to section 11.2 of the 1972 pension agreement to negotiate over how to distribute the Homestead pension fund. The parties reached an agreement which was embodied in a document entitled "Spang & Company Memorandum of Agreement" (the "Homestead closing agreement") dated May 22, 1973. A true and correct copy of the Homestead closing agreement, identified as Defendant's Exhibit T1, is attached hereto.

11. No employee or Union representative from the Lorain or Chicago plants participated in the Homestead closing negotiations.

12. Upon the Homestead closing, no pension funds from Chicago or Lorain were provided to or used for the benefit of employees at Homestead. Conversely, no portion of the Homestead pension fund was provided to or used for the benefit of employees at any other plant.

13. During the term of the 1977 pension agreement applicable to the Chicago and Lorain plants, Spang lost its contract to process slag at the U.S. Steel South Works in Chicago, and the Ferroslag Division plant in Chicago closed in 1979.

14. Upon the Chicago plant closing, sections 13.2 and 13.3 of the 1977 pension agreement applied automatically, as had been intended by Spang and the Union, limiting the Chicago participants to the Chicago pension fund.

15. Upon the Chicago closing, Spang and the Union met pursuant to section 13.2 of the 1977 pension agree-

ment to negotiate over how to distribute the Chicago pension fund (the "Chicago closing negotiations").

16. Spang accounted separately for the pension assets attributable to the Chicago plant, and provided annual reports of this information to the Union representative in Chicago. True and correct copies of documents evidencing this, identified as Defendant's Exhibits D3, Q3, R3, S3, T3, U3, V3, W3, and X3, are attached hereto.

17. During the Chicago closing negotiations, Spang knew the amount of the Chicago pension fund, and that there were surplus fund assets attributable to Chicago.

18. Based on information provided to the Union by Spang, the Union knew during the Chicago closing negotiations both the amount of the Chicago pension fund and that there were surplus fund assets attributable to Chicago.

19. During the Chicago closing negotiations, Spang secured a bid for a paid-up group annuity contract to secure the full accrued benefits of all of the Chicago employees from The Bankers Life Insurance Company. This bid was in the amount of $240,720.42, approximately $290,000 less than the total Chicago fund assets. A true and correct copy of the bid from Bankers Life, which was received by Spang through its actuary, is attached hereto, identified as Defendant's Exhibit F2.

20. Spang shared the bid from Bankers Life with the Union during the Chicago closing negotiations. A true and correct copy of a letter evidencing this, prepared at my direction and signed and sent by me, is attached hereto, identified as Defendant's Exhibit G2.

21. As a result of the Chicago closing negotiations, Spang and the Union arrived at a written collective bargaining agreement dated July 10, 1980 (the "Chicago closing pension agreement"). A true and correct copy of the Chicago closing pension agreement, identified as Defendant's Exhibit J2, is attached hereto.

22. Spang negotiated the Chicago closing pension agreement with the intent to remove any contractual barriers to its recovery of the Chicago pension fund surplus, and Spang understood that this was the effect of that agreement.

23. No party to the Chicago closing negotiations ever expressed an intent that any Chicago pension fund surplus would be used to provide benefits for the Lorain participants or be transferred to the Lorain pension fund.

24. No employee or Union representative from the Lorain plant participated in the Chicago closing negotiations.

25. Following the Chicago closing pension agreement, Spang intended, in 1980, to effect a termination of the Chicago pension fund with the Pension Benefit Guaranty Corporation (an "ERISA termination") in order to recover the Chicago pension fund surplus.

26. In 1980, Spang informed the Union and other interested parties (including the Chicago and Lorain participants) of its intent to effect an ERISA termination of the Chicago pension fund by a Notice to Interested Parties. A true and correct copy of the Notice to Interested Parties, identified as Defendant's Exhibit N2, is attached hereto.

27. Neither the Union nor anyone else objected to Spang's steps toward effecting an ERISA termination of the Chicago pension fund in 1980.

28. Spang ultimately decided not to complete the ERISA termination and recover the Chicago pension fund surplus in 1980.

29. The result of Spang's decision not to recover the Chicago fund surplus in 1980 was that the surplus remained, along with the assets of all of Spang's pension plans, in a master trust fund Spang maintained with Union National Bank.

30. From and after the Chicago closing pension agreement, Spang considered itself to be entitled to recover the Chicago pension fund surplus if and when it might chose to make an ERISA termination of the Chicago pension fund.

31. During 1980 pension agreement negotiations between Spang and the Union applicable only to Lorain, the Union requested increased defined benefit pensions (based on the 1980 "Big Steel" settlement).

32. Spang resisted the Union's request for increased defined benefit pensions by (among other things) showing that the Lorain pension fund was insufficient to provide the benefits sought by the Union.

33. To demonstrate this, Spang had its actuary produce an actuarial study of the cost of the increased benefits that the Union sought, compared against the assets of the Lorain pension fund. A true and correct copy of notes and calculations dated October 29, 1980, evidencing this study is attached hereto, identified as Defendant's Exhibit U5. The study and the notes and calculations identified as Defendant's Exhibit U5 were performed by Newton Huntley, Spang's actuary, at Spang's request, and were provided to Spang.

34. These actuarial figures were provided to the Union at its request during the 1980 Lorain negotiations.

35. During the 1980 Lorain negotiations, the Union never argued that the pension improvements that it sought were affordable because the Chicago fund surplus was part of the Lorain pension fund.

36. In the final pension agreement that was reached for the Lorain plant in 1980 Spang did not provide the benefit improvements that the Union sought.

/s/ PHILIP T. FORSLING

Philip T. Forsling

SWORN TO and SUBSCRIBED
before me this 4th day
of May, 1990.

/s/ KIMBERLY L. [ILLEGIBLE]

Notary Public
Commission Expires: 3/5/94

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANKLIN DiFRANCESCO and BARRY K. RACZ, Plaintiffs, v. SPANG & COMPANY, Defendant.	Civil Action No. 89-1680

AFFIDAVIT OF CHARLES R. DORSCH

COMMONWEALTH OF PENNSYLVANIA COUNTY OF BUTLER	SS:

Before me, the undersigned authority, personally appeared CHARLES R. DORSCH, who being duly sworn according to law, deposes and says that he is Vice President of Finance of Spang & Company, the defendant herein, that as such he has personal knowledge of the matters recited herein, and that the following is true and correct:

1. I have been the chief financial officer of Spang & Company since October 1978. As such, I have been personally involved in the administration of Spang's various pension plans.

2. Since 1966, the assets of essentially all of Spang's pension plans (including assets attributable to Spang's Ferroslag Division plants in Chicago, Illinois; Lorain, Ohio; and Homestead, Pennsylvania) have been maintained in a master trust fund pursuant to an agreement of trust with Union National Bank of Pittsburgh.

3. Spang has, at least since 1970, separately accounted for the assets of the three separate pension funds maintained for its Chicago, Lorain and Homestead Ferroslag Division plants, during the existence of each plant. True and correct copies of documents produced and maintained

by Spang that reflect its separate accounting, identified as Defendant's Exhibits D3 through Z3, are attached hereto.

4. After the closing of the Chicago Ferroslag Division plant in 1979, an amount sufficient to purchase paid-up annuities to pay the full accrued pension benefits of all Chicago plant employees (except Karl Kohlmeier, for whom a reserve was established) and to make lump-sum payments to employees whose benefits were valued at $1,750 or less was withdrawn from the Chicago pension fund maintained in the master trust.

5. After the withdrawal described in Paragraph 4 occurred, the remainder of the Chicago pension fund remained in the master trust fund.

6. None of the Chicago pension fund reverted to Spang until 1988, when Spang chose to effect a termination of the Chicago pension fund with the Pension Benefit Guaranty Corporation.

/s/ CHARLES R. DORSCH
Charles R. Dorsch

SWORN TO and SUBSCRIBED
before me this 7th day of
May, 1990.

/s/ LORI L. SMITH
Notary Public